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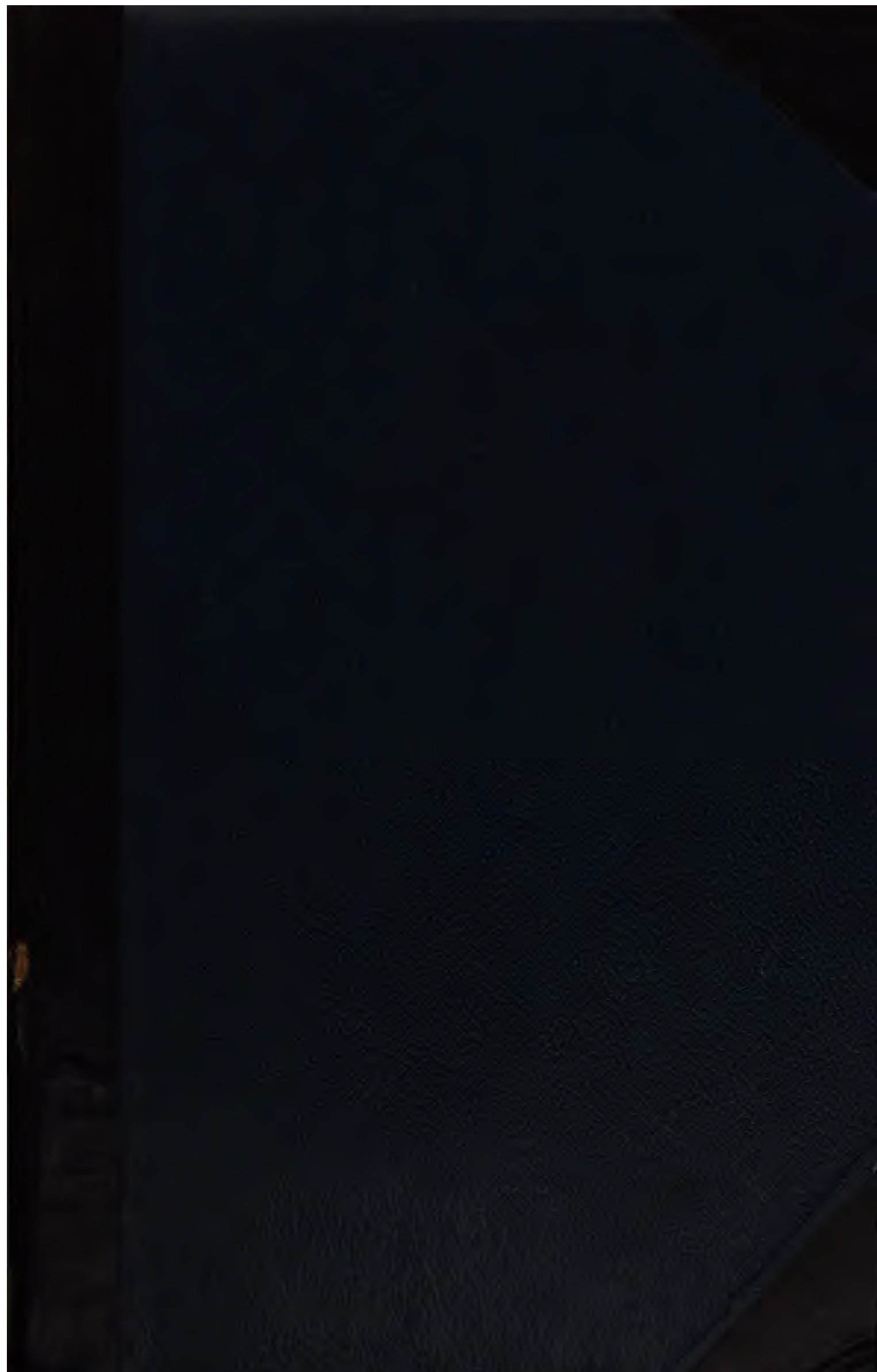
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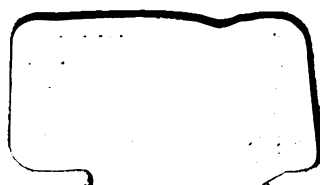
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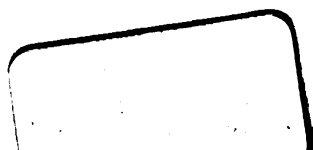


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DECISIONS  
OF THE  
SUPREME COURT, VICE-ADMIRALTY COURT  
AND  
BANKRUPTCY COURT  
OF  
MAURITIUS



DURING THE YEAR 1883

EDITED BY  
ANATOLE SAUZIER,—ADVOCATE

AND  
NORTH HALL

CHIEF CLERK, PROCUREUR GENERAL'S OFFICE.

MAURITIUS:  
GENERAL STEAM PRINTING COMPANY, GOVERNMENT STREET

1884



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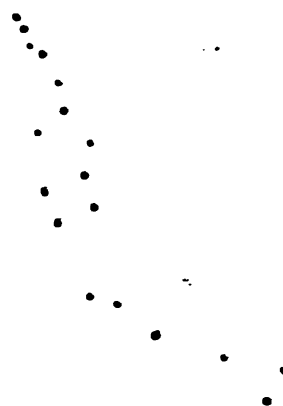
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# SUPREME COURT OF MAURITIUS

His Honor E. J. LECLÉZIO, Chief Judge.  
His Honor A. MURE, Puisne Judge.  
His Honor JOHN ROUILLARD, Acting Puisne Judge.  
His Honor FRÉDÉRIC CONDÉ WILLIAMS, Puisne Judge.

The Honorable E. PELLEREAU, Procureur and Advocate General (on leave).  
The Honorable L. COX, Acting Procureur and Advocate General.  
J. M. GIBSON, Substitute Procureur General.

J. ROUILLARD, Esq., Master, but acting as Judge of the Supreme Court.  
E. DIDIER St-AMAND, Acting Master.  
O. D'EMMEREZ de CHARMOY, Esq., Registrar.  
L. ISNARD, Assistant Registrar.

## VICE-ADMIRALTY COURT

His Honor E. J. LECLÉZIO, Chief Justice, Judge.  
The Honorable A. MURE, Judge Surrogate.  
The Honorable L. COX, Queen's Advocate.  
G. RITTER, Registrar.  
J. J. BROWN, Marshall.  
J. BOUCHET, Queen's Proctor.

## COURT OF BANKRUPTCY

JUDGE:—THE MASTER OF THE SUPREME COURT.  
Geo. NEWTON, Accountant in Bankruptcy.  
H. E. DOWSON, Registrar of the Court of Bankruptcy.

### COUNSEL (actually practising)

Leclézio, E.....	1828	Avice, H. ....	1868	Colin, R.....	1878
Bazire, E. ....	1858	Beaugeard, P. ....	1868	Delapelin, A. ....	1880.
Martin Moncamp, P. G...	1861	Brown, R. M. ....	1869	Newton, C. ....	1880
Rouillard, L. ....	1861	Lionnet, F. ....	1870	V. K/Vern .....	1880
Chastellier, P. L. ....	1864	Forget, A. ....	1870	A. Collard .....	1882
Delafaye, V. ....	1864	Thibaud, L. A. ....	1871	Laurent .....	1883
Guibert, G.....	1864	Desenne, O. ....	1871	Jenkins, D. ....	1884
Newton, W. ....	1864	Boucherat, A.....	1871		
Lepoigneur, I. ....	1864	Gallet, E. ....	1871		
Jenkins, T. L. ....	1865	Jollivet, I.....	1874		
Florent, E. ....	1865	Hewetson, H.....	1876		
Galéa, H. ....	1867	Hugues, A. ....	1877		

### ATTORNIES (actually practising)

Lalandelle, G.....	1842	Bitot, A.....	1863	Bouloux G.....	1876
Hewetson, W.....	1846	Bétuel, A.....	1863	Thatcher, H.....	1876
Laurent, E.....	1846	Boullé, V.....	1863	L'hoste, A.....	1877.
Mercier, J.....	1848	Ritter, G. A.....	1864	Giraudeau, G. ....	1877
Colin, A. J.....	1851	Rohan, A.....	1864	Leblanc, E. ....	1877
Guibert, J.....	1853	Halais, J. ....	1865	G. Herchenroder .....	1877
Finiss, W.....	1853	Sauzier, E.....	1866	Desveaux, A.....	1878
Bouehé, J.....	1853	Commarmond, A.....	1867	L. Lafitte .....	1878
Duvivier, Ed.....	1853	Rousset, C.....	1870	F. Chaillot.....	1878
Desperles, L.....	1859	Wohrnitz, L.....	1870	G. A. Hitié.....	1879
Herchenroder, T. ....	1860	Rolando, A. ....	1871	G. D'Emmerez de Char-	
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Chazal, P. E. de.....	1860	Ganachaud, E.....	1871	V. Ducasse .....	1879
Victor, F. ....	1860	Elie, J. ....	1871	H. Leclézio .....	1880
	1861	Lastelle, F.....	1872	W. H. Edwards.....	1881
	1861	Leblanc, W. ....	1872	E. Colip.....	1882
	1861	Arnal, C. ....	1873	E. Huteau.....	1882
	1862	Vaudagne, E. ....	1874		
	1863	Kronig, G.....	1874		



# JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS

EDITED BY

ANATOLE SAUZIER

ADVOCATE

AND

NORTH HALL

CHIEF CLERK PROCUREUR GENERAL'S OFFICE

1883

## SUPREME COURT

CLAIM OF LAND PURCHASED AT BAR, BUT OF WHICH POSSESSION WAS NOT TAKEN.—APPEAL AGAINST ADJUDICATION — PLEA OF PRESCRIPTION.—PRESCRIPTION DOES NOT RUN DURING APPEAL.

*In 1819 Mr F. Demianée purchased at the Bar a portion of land of 156 acres at La Nouvelle Découverte but of which he did not take possession. It remained in possession of one Kittery until Demianée's death in 1840. When the heirs Demianée attempted to obtain possession of the land, the heirs of Kittery, who also died in the interval, declined to give up the land and appealed against the order of adjudication of the land to Demianée in 1819.*

*Procedure was taken on the appeal but it was not followed up to its conclusion, and the plaintiffs now ask that the heirs Kittery be compelled to give up to them possession of this land and that they be paid in damages.*

*The defendants pleaded prescription.*

*Held that the defendants could not lead oral*

*proof of prescription of thirty years so as to give them a right to the land.*

*Costs reserved.*

*By a subsequent judgment this land was awarded to the plaintiffs.*

DEMIANÉE & ORS.,—Plaintiffs

versus

MOUTOU & ORS.—Defendants

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor A. MURE,—Second Puisne Judge

A. HUGUES,—Of Counsel for Plaintiffs

T. NICOLAS,—Attorney for the same

W. NEWTON,—Of Counsel for Defendants

N. ARNAUD,—

F. SIMONET,—} Attorneys for the same

A. ROLANDO,—

Record No. 21,411.

5th January 1883

In this action the plaintiffs in their declaration, which is dated and was served on 11th August 1881, allege that on 27th January and 10th February 1819, the late Jean François Demianée purchased on the resale by way of "Folle Enchère" before the Court of First Instance a portion of land situated at "Nouvelle Découverte" of the extent of 156½ acres; that he remained owner of the said estate till his death; that his succession was divided into five shares, some of his children having predeceased him, leaving children who took their parent's share; that on 21st October 1840 the heirs of Demianée applied to the late Court of first instance to be authorized to sell judicially the said land and as a fact, were duly authorized so to do;—that thereupon the heirs Kittery (these being the heirs of Saminaden Kittery, who was in possession of the land in 1819, when a process of licitation was raised against him) on the 29th March 1841 lodged an appeal against the adjudications made in the process of licitation in the course of which the said land had been adjudged to Demianée;—that the appeal was never prosecuted from that date and that the proceedings therein have therefore lapsed—that the defendant Moutou, without any right or title has for many years taken possession of the said land, and derived great profit therefrom to the loss of the plaintiff and refuses to quit it. The plaintiffs conclude for the judgment of the Court: 1o. decreeing that the said landed property formed part of the Estate and succession of the late J. F. Demianée and belongs now to his heirs; 2o. condemning the defendant to quit and leave the said property and deliver it to the plaintiffs and the other owners thereof and 3o. condemning the defendant to pay ten thousand rupees of damages, to be enforced by caption of the body.

To this action not only the defendant Moutou was called, but all the members of the Demianée family who had not joined in the action as plaintiffs. These last simply abide by the decision of the Court, but the defendant Moutou stated pleas in answer to the claim which have necessitated considerable procedure and delayed the determination of the case. He pleaded that the plaintiffs had no right of action against him,—no right, title, or capacity to raise the action and he also denied and traversed all the facts alleged by the plaintiffs, and then he further pleaded that Jean François Demianée had never legally purchased the said land or paid any price thereof or possessed

and enjoyed the same. The next plea is that the defendant is *bond fide* proprietor of land different from that described in plaintiffs' declaration and that he and his authors have possessed the same prescriptively for more than thirty years and that he and his authors for more than thirty years have been and still are in full quiet peaceful uninterrupted and public possession of the same.

Thereafter the declaration was amended and new description of the subject claimed by the plaintiffs was substituted for the other. Amended pleas were then lodged by the defendant in which he so far repeated his previous pleas, but further maintained that the plaintiffs' action and alleged rights are barred by the prescription of thirty years.

When the case was first heard by the Court the question between the parties seems to have been whether *subpœnas* should issue or not and in consequence of the defendant alleging that the land in his possession was not that claimed by the plaintiffs, the Court ordered *subpœnas* to issue, all rights and objections of parties being fully reserved.

At the next hearing of the case on 30th May last, the counsel for the defendant Moutou admitted that the land in possession is the same now claimed by plaintiffs, but he maintained his other pleas and chiefly that the plaintiffs had not proved they were the heirs of J. F. Demianée, and that there was no proof of the latter's death, and he further maintained that, as the plaintiffs had not applied for and obtained the peremption of the appeal taken against the judgment of adjudication, the same was still pending. The Court on 2nd June last found that there was sufficient proof of Demianée's death but sustained the contention that the appeal lodged against the judgment of adjudication was still pending, and granted a delay of four weeks in order that a demand praying for the peremption of the said appeal should be entered, and this case was in the meanwhile sisted. On 17th June 1882 the process of peremption was raised, and decree in that action was pronounced on the 21st November 1882.

Procedure in the principal action having been resumed at the last hearing thereof Mr Newton counsel for the defendant Moutou at first did not admit that there was any proof that the plaintiffs and others in the cause besides himself were heirs of Demianée, but the acts of the Civil Status proving the affiliation of the parties having been placed

before him be then admitted their capacity—and giving up all his other pleas admitted that under the circumstances he must establish his plea of prescription. On his tendering witness to prove that his client Moutou by himself and his predecessors had been in possession of the ground for more than thirty years, the Counsel for the plaintiffs objected to oral evidence being led and argued that prescription could not be sustained in this case because 1o. it had suffered interruption by several acts of procedure served at the request of the heirs Demianée upon the appellants the heirs Kittery in their appeal against the judgment of adjudication in favor of Jean François Demianée by which they showed their intention to dispute the appeal and maintain the validity of the adjudication. 2o. Even if it had not been interrupted the possession of the defendants' authors was precarious, their right having been adjudged to some one else, from which adjudication they had appealed to a higher Court and that thus they could never regard themselves as having a title of ownership.

From the statement of facts and of the procedure which has been now mentioned it will be seen that in 1819, Jean François Demianée became the purchaser of the property in question, and held a title thereto by way of adjudication. Nothing seems to have been done by him during his life time to make this decree of adjudication operative, and to obtain possession of the land to which he had thus acquired a title but immediately after his death his heirs moved in the matter, and attempted to sell the estate judicially. This roused the opposition of the heirs of Saminaden Kittery who had been in possession when it was sold in 1819. An appeal was taken by them against the judgment of adjudication pronounced twenty one years before and it is now clear that their whole object in taking that appeal was to stop the sale of the property by the heirs Demianée, in which they succeeded, and to be allowed to remain in possession thereof. This appeal was never prosecuted to its termination, the principal steps of procedure indeed have disappeared, but there is abundant evidence of their existence. An original interlocutory judgment of the Court pronounced on 19th April 1841 has been produced, in which it is declared that the defendants, the heirs Demianée, are ready to stop procedure in the judicial sale of the immoveable property depending from the succession of Jean François Demianée until after the decision of the appeal brought by the heirs Kittery of the judgments of 27th Ja-

nuary and 10th February 1819; the heirs Demianée are then by this judgment ordered to cease proceeding with the judicial sale of the immoveable property until a determination has been given upon the appeal dated 27th March 1841 of the two judgments in question.

Besides this we have the copy of a summons under the hands of an usher of the Court dated 23rd August 1841 by the heirs Demianée served on the heirs Kittery to compare before the Court on the 2nd September next and discuss the pleas of the appeal. Then on the 21st December 1844 we have a similar document under the hands of an usher of the Court, at the instance of the heirs Kittery against the heirs Demianée to compare at a certain date and proceed and plead upon the points raised in the appeal. Again on 24th January 1855 we have an original summons under the hand of the late Justice Rémono, taken at the instance of the heirs Demianée, ordering the attorneys of the appellants to attend him at Chambers to see various suggestions made in the record of the appeal consequent on the marriage and death of several of the parties thereto.

The last apparent step took place on 11th March 1865 when the heirs Kittery intimate that the appeal is to be heard on the 1st of April then next and give notice of many suggestions which have to be entered on the record.

These being the steps of procedure known to the Court, it is clear that the heirs Kittery contented themselves with making a show of prosecuting the appeal and they do not seem ever really to have desired to bring it to a conclusion. By entering an appeal against the adjudication and having made the title of the heirs Demianée litigious, the heirs Kittery had the lead in the appeal. All that can be urged against the heirs Demianée was that they had a faculty of acting in the event of the other side not doing so. But a faculty is not an obligation and the non use of such a faculty ought never to infer the forfeiture of their right. On the other hand the appellants were aware that their right to this property was disputed, they were aware that steps had been taken to expropriate their ancestors Saminaden Kittery, that a process of licitation had resulted and that an adjudication of their property had been made to Demianée, to get the better of that they had been forced after many years to lodge appeals against the judgment of



adjudication, and these appeals for the long period of forty one years they have allowed to remain in suspense, and undecided. They now maintain that their possession during this period of time will give them a prescriptive right to the land which was in dispute and the question arises, have they had that peaceable, public unequivocal possession with the title of owners, which the law requires as condition of the thirty years' prescription.

It seems to the Court that it is impossible to hold that the appellants are entitled to reckon possession pending the appeal, as possession which can originate a prescriptive title in their favor. This was not a piece of land, the history of which was unknown and which the defendant and his predecessors have possessed peaceably and publicly and as owners thereof during the years necessary to prescribe a right. Both Saminaden and his heirs knew that the title had gone into the hands of another party and during the period of more than forty years they have, by instituting an appeal, prevented action being taken upon the title of that party. The authority of most of the French commentators, and certainly of those whose opinion is of of the greatest weight is against the contention of the defendant. Troplong, than whom no higher authority can be quoted on the law of prescription, thus writes on the very question which the Court is now considering :

Troplong, Prescription Vol. 1 Sect. 684: "On sait qu'il y a dans une procédure des actes prohibitifs et suspensifs, qui paralysent le droit de celui à qui ils sont signifiés. Par exemple, un acte d'appel empêche l'exécution du jugement de première instance, et si celui qui a triomphé devant le premier juge n'est pas en possession de l'immeuble, dont il a été déclaré propriétaire il ne peut posséder tant que le tribunal supérieur n'a pas prononcé sur l'appel. Eh bien ! supposons que dans un cas où la prescription ne s'acquiert que par trente ans l'appel soit resté impoursuivi pendant ce long terme, l'appelant pourrait-il opposer à l'intimé que son droit est prescrit, faute de s'être réalisé dans le délai de trente ans ? Pourrait-il lui dire que la prescription a couru à l'égard des deux parties et que l'extinction rétroactive de l'instance d'appel doit produire ses effets tant à l'égard de l'intimé qu'à l'égard de l'appelant de telle sorte que l'appel étant effacé, il ne reste plus qu'un jugement de première instance frappé par la prescription, puisque pendant trente ans il est resté inerte ? La négative

"est incontestable. Car pendant la durée des trente ans, l'appel a été un obstacle insurmontable à l'exécution du jugement et l'intimé n'a eu qu'à se placer sous la protection de la règle, *Contra non valentem agere nulla currit præscriptio*, suspendu durant ce laps de temps, la prescription n'a commencé à courir que dès le moment où l'extinction de l'appel a permis de procurer l'exécution du jugement de première instance devenu définitif."

The jurisprudence of the Court of "Cassation" is to the same effect.

There are two cases reported in S. V. 1839 part I page 215 and part I page 575 both of which are to the same effect and the rubric of the former of which we quote : "Pendant la durée de l'instance d'appel la prescription des condamnations portées par le jugement attaqué ne court point en faveur de l'appelant et cette suspension de prescription conserve son effet quoique l'instance soit ensuite déclarée périmée. Dès lors l'appelant qui durant l'instance d'appel et pendant plus de trente ans est resté en possession de l'objet litigieux ne peut prétendre valoir de cette possession comme fondement de la prescription à son profit."

It is to be observed that we have here a decree of peremption of the appeal and in terms of the 469th article of the Code of Civil Procedure the peremption of the appeal has the effect of giving to the original judgment the authority of a *res judicata*.

The case of which the rubric has been quoted lays down as a deduction from this, that the right of the party holding the original judgment is thereby preserved, from which it seems to follow that the judgment of adjudication in this case in favor of Demianée is preserved in force, notwithstanding the long period of time since it was pronounced.

It was strongly argued by the defendant's counsel that nothing prevented the respondents from taking up the appeal and following out its instance themselves and thus to remove the obstacle, which stood in their way of making the judgment of adjudication effectual. But this argument was pleaded also in the case, which we have just quoted, and was disregarded by the Court of "Cassation," and in principle we think that the failure to take advantage of a mere faculty ought not to import the loss of a right. This is the

view also of Carré and Châvveau in their "Lois de la Procédure Vol. IV Quest. 1689" "En effet, nulle déchéance ne peut être invoquée contre l'intimé que l'appel avait empêché jusqu'au moment de la péremption d'agir pour l'exécution ou jugement; à son égard, l'instance d'appel doit produire l'effet qu'il en attend, l'interruption de la prescription puisqu'elle a produit contre lui l'effet suspensif qui en est la cause et le principe. Peu importe que d'après l'art. 401, il ne soit plus permis de se prévaloir d'aucun des actes de la procédure périmée. Ce n'est qu'au désavantage de l'appelant que cette règle doit être ici appliquée parce que lui seul est en faute de n'avoir pas donné suite à son instance."

On the above grounds the Court is of opinion that the defendants' contention must be disallowed and that he is not entitled to lead oral proof of prescription for thirty years so as to give him right to the land. We appoint the case to be enrolled for further procedure, and in the meantime, reserve the question of costs.

### SUPREME COURT

DEMIANÉE & ors,—Plaintiffs

versus

MOUTOU & ors,—Defendants

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor A. MURE,—Second Puisne Judge

A. HUGUES,—Of Counsel for Plaintiffs

T. NICOLAS,—Attorney for the same

W. NEWTON,—Of Counsel for Defendants

N. ARNAUD,—

F. SIMONET,— } Attorneys for the same

A. ROLANDO,—

Record No. 21,411

22nd March 1883

After reading the conclusions of the "Ministère Public" we give judgment for plaintiffs in terms of the first and second conclu-

sions of their declaration. The third conclusion having been withdrawn. We further find the plaintiffs entitled to costs.

### SUPREME COURT

CLAIM OF SUCCESSION ON SCORE OF PARENTAGE. — MARRIAGE IN INDIA. — EVIDENCE OF AFFINITY.

*The plaintiff claimed to share in the succession of one Rungasamy, her deceased grandson.*

*The evidence shewed that the deceased was the son of the plaintiff's daughter, who was born from plaintiff's marriage in India according to Hindoo Rites, and that she had always been recognised by deceased as his grandmother.*

*Held that plaintiff is entitled to share in the succession.*

Widow YAGAMBRUN—Plaintiff

versus

CHINIEN & others—Defendants

and

CHINIEN—Plaintiff

versus

YAGAMBRUN & Others—Defendants.

Before

His Honor E. J. LECLÉZIO,—First Puisne Judge.

and

His Honor L. Cox,—Third Puisne Judge.

W. NEWTON,—Of Counsel for Chinien

H. BERTIN, Attorney for the same

E. ROUILLAND & H. GALÉA,—Of Counsels for Chinien

T. NICOLAS,—Attorney for the same

G. GUJBERT & V. DELAFAYE,—Of Counsels for Widow Yagambrun

E. LAURENT,—Attorney for the same

H. GALÉA,—Of Counsel for Widow R. Mootoo & Mootoosamy Modely

A. ROLANDO,—Attorney for the same

A. THIBAUD,—Of Counsel for Mootoosamy Yagambrun

W. EDWARDS,—Attorney for the same

A. THIBAUD,—Of Counsel for Father D'Arribère & Sinnatambou

G. KÖENIG,—Attorney for D'Arribère

J. ELIE,—Attorney for Sinnatambou

Record Nos. 21,615 & 21,677.

7th February 1883.

In the first of these actions, Amoorthan styling herself the widow of Yagambrun asked the Court to decree that a document purporting to be the testament of the late Rungassamy, who the plaintiff alleged was her grandson was not the true will of Rungassamy, but a forgery.

To this action were made defendants the several persons appearing as legatees under the will challenged and also Chinien Modely the uncle of Rungassamy. Chinien in his plea, expressly denied that the Plaintiff was as she alleged the grand mother of the *de cuius*, and immediately after, entered the second of these actions in which after stating that he is the paternal uncle of Rungassamy, and as such the person entitled to his succession, he asks for the same decree as Amoorthan had asked in the first action.

When the case came for trial, it was agreed between the parties that the main question raised, whether the document challenged was or was not the will of Rungassamy should be first gone into, the further question whether or not the plaintiff Amoorthan is entitled to call herself the grand mother of the *de cuius* being reserved for further consideration. The Court thereupon proceeded to try the first at issue, and after hearing evidence came to the conclusion that the paper purporting to be the testament of Rungassamy was not really his testament.

We have now to decide as we have been asked by the parties to do, the issue contained in Chinien's plea to the first action and the plaintiff's replication thereto, as to whether Amoorthan is or is not the grand mother of Rungassamy.

The plaintiff's case is that about forty years ago she was married to Yagambrun at the village of Allapekum, in India, according to the Hindoo Rites.

That they had issue, a son, Mootoosamy Modely who is still alive and was heard as a witness before us, and a daughter Poonamah who became the wife of Mootoo and the mother of the *de cuius* Rungassamy. The defendant Chinien admits that Poonamah the mother of the *de cuius* was the daughter of the Yagambrun, of Allapekum, but he asserts that the wife of Yagambrun and mother of Poonamah was one Pavadoo and not the plaintiff. In support of the plaintiff's contention we have three witnesses who swear to her marriage with Yagambrun. The evidence is confirmed by the fact that she was always considered and treated by Mootoo as his mother in law, and by Rungassamy as his grand mother. It is even shewn that at the request of the latter, then still a minor, his guardian was authorized by a family council to pay to the Plaintiff a monthly alimony out of his Estate, in virtue of Article 205 of the Civil Code. On the part of the Defendant we have only two witnesses, Chinien himself and one Mootoosamy alias Moorghen who really contradict the plaintiff's witnesses and we think that upon their statements it is impossible to rely. Upon the whole evidence we must find in favour of the plaintiff Amoorthan and hold that Rungassamy was her grandson, and that she is accordingly entitled to a share in his succession. We also give the plaintiff her costs against Chinien.

## SUPREME COURT

APPEAL FROM JUDGMENT OF STIPENDIARY MAGISTRATE MOKA.—CLAIM OF SALARY BY MANAGER, PAYMENT OF WHICH WAS REFUSED ON ACCOUNT OF NEGLECT OF DUTY.

*This is an appeal from a decision of the Stipendiary Magistrate of Moka condemning the appellant to pay the respondent one month's wages as manager of his Sugar Estate.*

*From the evidence it appears that the respondent was engaged on 1st September 1882 as manager of appellant's sugar estate and that his services were dispensed with on the 30th by the appellant on the plea that respondent had neglected his duty.*

*The respondent sued the appellant before the Stipendiary Court of Moka and the latter was condemned to pay the respondent's salary for September, but not for October.*

*Against this decision the appellant appeals.*

*Held that no fault was proved as would justify the forfeiture of salary for which the respondent had worked.*

*Appeal dismissed with costs.*

—  
W. HEWETSON—Appellant.

versus

L. BRUNET—Respondent.

—  
Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge  
and

His Honor A. MURE,—Second Puisne Judge

—  
WILLIAM HEWETSON appearing in person.

WILLIAM HEWETSON,—Attorney for himself.

T. L. JENKINS,—Counsel for Respondent.

P. F. LASTELLE,—Attorney for the same.

—  
Record No. 96.

8th February 1883.

The case now appealed commenced in the Stipendiary Court of Moka with a claim for Rs 400 for two months wages during September and October last, alleged to be due by the appellant to the Respondent.

It is admitted that the former had engaged the latter as Manager under himself of the Sugar Estate "La Laura" "Roselyn Cottage" and "Ripailles" from first September, and that on that date he entered on his duties and worked without objection, and without any fault being found with him till the evening of the thirtieth September.

The Stipendiary Magistrate has found the respondent entitled to Rupees 200, his wages for September, and has refused him wages for October. The Respondent has acquiesced in this judgment, but the appellant,—defendant in the lower Court—has appealed and asks the Court to find that no wages are due to the Respondent and to dismiss his claim.

In this position of matters, the question for the decision of the Court is whether the respondent had done anything which requires the Court to hold that he has forfeited his right to wages for the month of September. For it is clear that he was entitled to be paid on the evening of the 30th September, and unless there was such misconduct as necessitates the forfeiture of the wages, the respondent's right to them constitutes a liquid claim, which ought to have been paid on that evening, or at latest on the morning of the first October.

It appears that in consequence of three Estates having been united into one under the appellant, he fitted up for the last season's "Coupe" new machinery for the larger Estate at the Sugar Mill of "La Laura". The appellant had told the previous Manager of the Estate, Mamarot, to use two syrup pumps at "Roselyn Cottage" for the new machinery at "La Laura", but this, that Manager had not attended to, and they were still at "Roselyn Cottage" when the respondent entered on duty on first September. If there were evidence, that the appellant had renewed these instructions to the respondent and directed him specially to put up the "Roselyn Cottage" pumps, there would have been ground for holding that there had been disobedience to orders. But the appellant's evidence only goes this length, that he gave minute directions to the respondent to fit up two syrup pumps, the second to be of use if the first failed. There is no evidence whatever that the respondent received instructions to put up the "Roselyn Cottage" pumps. What took place when the syrup pump was selected by the respondent confirms the view of the evidence. The respondent took the Engineer Verneur and showed him the pump; Verneur says, he warned him it was not fit for regular use, to which the respondent replied, what can I do? The other two here in the yard are worse. The fact that the others were worse was then and there verified by Verneur.

Further the appellant himself according to the testimony of his own witnesses, and among others of Duvergé, saw the pump while it was being put up, and there is also evidence that

he ordered that very pump to be painted internally. The conclusion in the mind of the respondent must have been that the appellant was aware that that particular pump was being fitted up. The pump was used for the first time on the twenty ninth September, that is, as soon as it was erected and no fault is found with the respondent, that it was not sooner begun to be used. On the afternoon of that day it got out of order and only worked for half a day. On the next day the thirtieth the mill was stopped for two hours and the appellant in the course of his morning visit, ascertained that the pump was insufficient, and bringing the Engineer Verneur to the spot they found in the Court of the Mill the "Roselyn Cottage" pumps, one of which was substituted for the defective pump with the result that the mill went on effectually. Now it is sworn by Serret, whose evidence is important that he saw the "Roselyn Cottage" pumps brought to "La Laura" for the first time on the morning of the thirtieth September and that they were not there on the twenty ninth of that month, and this is confirmed by a witness who made an inventory of all the machinery at "La Laura" and did not see them there up to the twenty first September, when the inventory was completed.

The appellant pleaded that the respondent was grossly in fault, because (first) he knew of the "Roselyn Cottage" pumps and should have put them up, and not finding them at "La Laura" he ought to have gone to the place, and directed them to be removed and put up at the latter, and (secondly) because he had not informed him, the appellant, that the pump put up would not work satisfactorily. But on the first ground, we hold that the appellant has failed to prove that the respondent had any knowledge of the "Roselyn Cottage" pump, and on the second ground, as the pump had only been working for a few hours on the twenty ninth and went wrong at five o'clock P. M., of that day and the appellant in his morning visit to the mill on the thirtieth saw its unfitness, there seems to have been no excessive delay and no fault such as would justify the forfeiture of the wages for which the respondent had worked.

The Appellant also laid great stress on the fact, that there was an apparent deficiency in the money chest, which was under the care of the respondent. But on this point it is enough to say that the proof of such deficiency is not so clear and satisfactory, as to enable the Court to proceed thereon as a sufficient defence to the present action. The evidence of the

accountant and sub-accountant, who kept the books of the Estate, such as it is, is not so certain and distinct as to prove the deficiency on the part of the respondent, and that matter, if still to be followed out, remains for investigation. On this point we concur with the Stipendiary Magistrate.

On the question of costs though the respondent claimed two months' wages, and has only got one, yet the defence required the whole evidence and procedure, which has been had on the whole matter we dismiss this appeal with costs.

## SUPREME COURT

### APPLICATION TO SET ASIDE AFFIRMATIVE DECLARATION OF GARNISHEE.—INTEREST.—COSTS.

*The plaintiff's action contained three points :*

1o. *That the defendant's declaration as garnishee of monies due to one Pragassa, that he was entitled to set off of Rs 200, be set aside.*

*Declined as this sum was mentioned in the judgment of validity which was assented to by plaintiff.*

*The second point was a claim of interest on a sum for which judgment was given against the defendant in March 1882.*

*As neither the judgment nor the registrar's notes in the case contained any mention of interest, the application was also declined by the Court.*

*The third point raised is as to the costs to be paid by the defendant in the judgment already referred to, the defendant was condemned to pay  $\frac{1}{2}$  of the plaintiff's costs, the question that arose was whether this meant  $\frac{1}{2}$  of the whole costs incurred by the plaintiff.*

*Held that this was the intention of the Court.*

ROHAN—Plaintiff

versus

BAYA.—Defendant

—  
Before

His Honor Sir A.G. ELLIS Kt.—Chief Judge

and

His Honor E. LECLÉZIO—First Puisne Judge

—  
A. BOUCHERAT.—Counsel for Plaintiff  
G. BOULOUX.—Attorney for the sameW. NEWTON & L. A. HUGUES.—Counsel for  
DefendantF. VICTOR & A. LEBLANC.—Attorney for the  
same—  
Record No. 21,670.—  
JUDGMENT OF HIS HONOR JUSTICE LECLÉZIO—  
8th February 1883.

In this case the Plaintiff has entered an action in order to obtain from the Court a decree setting aside an affirmative declaration made by Mr Baya as garnishee and now the defendant in this case, because it was erroneous and incomplete. The defendant first stated that he was entitled to set off a certain sum viz: Rs. 200 against the claim of the plaintiff against Mr Pragassa his debtor; the defendant now restricts his right to compensation to that sum which was mentioned in the judgment of validity of the attachment lodged in his hands by Mr Rohan the plaintiff, against monies due by the defendant to Mr Pragassa. There can be no doubt that that sum was inserted in the judgment of validity by the common consent of Mr Rohan and of Mr Pragassa, when they appeared before the Judge in Chambers, as one which Pragassa would receive personally from Baya, and that therefore Mr Baya is entitled to deduct that sum from the sum which has been

attached in his hands by plaintiff as creditor of Mr Pragassa.

The second point which was argued before the Court was one concerning the interest which was inserted in the writ of execution after the judgment of March of last year in which the defendant was condemned to pay a certain sum, but with no mention of interest. We have looked in the record of this case and in the notes taken by the Registrar to see whether any mention was made with regard to this matter, and it does not appear that at the time when the judgment was given any mention was made to the effect of obtaining a mention of interest in the judgment. Therefore we think that as no mention of interest was made in the written judgment, and as no motion was made by the plaintiff at the time when the judgment was read in Court, that the party who obtained the judgment was not entitled to ask that interest from the date of the demand up to the date of the judgment should be inserted in the writ of execution. The interest so inserted amounts to a sum of Rs. 61.13. and that should be excluded from the amount which the plaintiff takes as being the principal sum.

There is another question, which is as to the costs to which Mr Baya was condemned by that same judgment of March 1882. The judgment says that Mr Baya will pay to the plaintiff in this case one third of his costs; meaning thereby one third of the plaintiff's costs. The question which is now before the Court is whether Mr Baya was condemned to pay one third of the whole costs incurred by the plaintiff in the case or whether he was condemned to pay one third of the costs made especially against him. We have looked into the judgment in order to be able to interpret its meaning. I may say I was one of the judges who gave that judgment, together with my brother Mr Justice Mure, and I have no doubt from the whole tenor of the judgment that our intention was when we condemned Mr Baya to pay one third of the plaintiff's costs, that he should pay one third of the whole costs. In this case, there were at first four defendants, but at the very threshold of the case, one of those four defendants disappeared, and that is one of the reasons why we condemned Mr Baya to pay one third of the whole costs incurred by the plaintiff.

Having disposed of the three points argued before the Court in this case, we have only to deal with the total amount to which the

plaintiff is entitled now. The plaintiff's counsel in this case has himself reduced the amount to the sum of Rs. 783.44 c., less that sum of Rs. 200, which he acknowledged in Court was to be deducted from that sum, that would have made the whole amount Rs. 583.44 c., but the Court being of opinion that the interest also, which was calculated upon the Capital mentioned in the judgment of March 1882, should be deducted from the amount mentioned in the writ of execution issued by the Registrar,—the total amount will then be reduced to Rs. 522.31, for which amount judgment is now given in favor of the plaintiff, together with interest from the date of the service of the declaration upon the defendant. We think that as Mr Baya has been partly successful in this case, he should pay only half of the plaintiff's costs.

JUDGMENT OF HIS HONOR A. G. ELLIS

8th February 1883

I entirely concur in the judgment which has just been delivered.

### SUPREME COURT

**CERTIORARI.—CONSTRUCTION OF A DIKE IN A RIVER.—MAGISTRATE HELD THAT THERE HAD BEEN NO CONSTRUCTION BUT MERE REPAIR.—DECISION UPHOLD.—ARTICLE 23 OF ORDINANCE 35 OF 1863.**

*The defendant was prosecuted before the District Magistrate of Moka for having caused a dike to be constructed in the Moka River. The evidence before the Magistrate shewed that the dike was an old one that the defendant had merely repaired.*

*The Magistrate dismissed the charge.*

*Held that the repair of a dike already existing may not constitute an infraction of the law, which forbids the placing or making new constructions in a river, within the meaning of Article 23 of Ordinance 35 of 1863.*

*Rule discharged.*

PROCURÉUR GENERAL—Plaintiff

versus

DISTRICT MAGISTRATE OF MOKA  
WILLIAM HEWETSON—Defendants

Before

His Honor A. MURE.—Second Puisne Judge

and

The Honorable L. COX — 3RD Puisne Judge

J. M. GIBSON, Substitute Procureur General,—Of Counsel for Appellant  
J. GUIBERT,—Attorney for the same.

WILLIAM HEWETSON appeared in person.  
WILLIAM HEWETSON—Attorney for himself.

Record No. 21,819.

8th February 1883.

This is a rule calling upon the District Magistrate of Moka and William Hewetson to shew cause why a judgment given by the former on the fourth day of December last, which has been brought before us by writ of *certiorari* should not be set aside. By that judgment the Magistrate dismissed the information charging the defendant, William Hewetson, with having caused a dike to be placed in the course of a stream leading into the Moka river, without having obtained the authority of the Executive Council so to do.

The charge was brought under Article 23 of Ordinance No. 35 of 1863, which provides that "All persons are forbidden unless with authority of the Executive Council, to stop or change the level of any stream being public property or to make or place in the course thereof any dike, dam or construction of any kind."

The evidence before the Magistrate shewed that the dike was an old one, which existed before Ordinance No. 35 of 1863, and that the defendant had recently caused it to be repaired, without having applied for, or obtained any authority. The Magistrate after

hearing the evidence and examining the dike on question, gave the following judgment :

" I find the accused not guilty and dismiss the charge."—For the Crown it was contended 1o. That the mere fact of repairing the dam amounted in law to " making or placing a dike in the course of the stream." We cannot entertain this proposition, just as we cannot entertain the counter proposition put forward by the defendant before us, that the owner of an existing dike can repair it in any way he likes, without ever committing a breach of Article 23.

For we can conceive that in one case repairing a dam, may be simply consolidating and keeping up the existing construction, and that in another, in consequence of the magnitude and character of the work it may amount to " placing or making " a new construction within the meaning of article 23.

The solution of the question whether in any case repairs come within the article at all, must depend upon the special circumstances of that case : in other words the question is one of fact and not of law.

It was next argued by the Substitute Procureur General that at all events in this case the evidence before the Magistrate showed that there had been such an alteration of the original dike as to make the construction a new one, and therefore that the case was within the article. But we cannot interfere with the Magistrate's finding upon the facts of the case : He has heard the evidence, examined the dike himself and acquitted the defendant.

Even if we were satisfied that his decision on the evidence is erroneous (and we are not prepared to say that it was) we could not interfere, because there would be no want or excess of jurisdiction or other error in law.

This rule must be discharged.

### SUPREME COURT

AMENDMENT OF JUDGMENT OF SUPREME COURT. — APPEAL TO PRIVY COUNCIL WHEN ALLOWABLE. — EXECUTION OF JUDGMENT PENDING APPEAL. — COSTS.

*This is a cross action. In the first case the plaintiff requested the amendment of a*

*judgment of the Supreme Court dated the 17th November 1882, restoring to the plaintiff the possession of a portion of land in the district of Port Louis held by the defendant.*

*The amendment prayed for was to the effect that the defendant be ordered to remove within a time to be fixed, a hut existing on the said land, and in default that the plaintiff be authorised to have it pulled down.*

*Held that an amendment of the judgment was competent, and ordered as an addition to judgment that the hut be removed within 15 days, failing which the plaintiff shall have the right to pull it down.*

*The cross action entered by the defendants (Dewille) moved to be allowed to appeal to the Privy Council from a judgment of this Court dismissing her claim to indemnity for land withdrawn from the portion leased by Government, and which the Crown has disposed of.*

*The indemnity claimed had not been decided by the Court, but as it exceeded the appealable amount, the Court sanctioned the appeal to the Privy Council on the usual security being furnished.*

*An application by the Government, for the execution of the judgment giving possession to the Government of the land forming the subject of this action was granted. Costs divided.*

COLONIAL SECRETARY.—Plaintiff

versus

WIDOW DEVILLE & another—Defendants

and

WIDOW DEVILLE.—Plaintiff

versus

COLONIAL SECRETARY. — Defendant

Before

His Honor A. MURK.—Second puisne Judge

and

His Honor L. COX.—Third Puisne Judge



J. M. GIBSON, Substitute Procureur General,  
—Counsel for Colonial Secretary  
V. DUCRAY,—Attorney for the same

T. L. JENKINS.—Counsel for Widow Deville  
J. MERCIER,—Attorney for the same.

Records Nos. 21,333 & 21,338

14th February 1883.

In the first of these actions, that at the instance of the Colonial Government, judgment was pronounced on the merits of the case towards the end of the last session, and that judgment thus concluded: "Upon the whole case we give judgment for the plaintiff, but without damages."

The declaration in this case craved the Court *inter alia* to decree that the said plaintiff in his "aforesaid capacity shall resume possession of the said portion of land, and that the hut built on the said land shall be removed within a time to be fixed by the Court, failing which the said plaintiff shall have the right to cause the same to be pulled down." In this position of matters as no time is fixed by the judgment for removing the hut built on the land, a motion is made by the plaintiff, that an addition should be made to the judgment to the effect that the hut built thereon be removed by widow Deville within fifteen days. This motion was objected to as unnecessary and incompetent, and was maintained by the Substitute Procureur General on the ground of expediency and *ob majorem cautelam*. The attention of the Court does not seem to have been directed to the rather indefinite terms of the declaration above quoted, and there can be no doubt that a certain ambiguity between the terms of the judgment and the conclusion of the declaration would result, if execution followed on the judgment in its present form, the defendants might say that they were entitled to a delay to be fixed by the Court between the intimation of the intention to execute the judgment and the operation of pulling down the house. In such a case as this, in which parties are contending for the utmost point of their right, it seems expedient that the amendment sought should be made. On the question of its competency the Court has no doubt. Amendments of judgments have been declared to be competent in the previous practice of this Court, and as in truth a mere clerical error has

occurred when the judgment was pronounced and as that judgment has not been signed and extracted by the registrar, we think the motion is still in time. Archbold in book of practice says that: "The judgment is amendable at common law in substance or in form at any time during the term which it is signed, and after that time even after error brought and *in nullo est error* pleaded."

We accordingly direct as an addition to the judgment previously pronounced the addition of the following words: "We further decree that the aforesaid plaintiff in his aforesaid capacity do resume possession of the said portion of land and that the hut built on the said land shall be removed by the said defendants within fifteen days, failing which the said plaintiff shall have the right to cause the same to be pulled down."

The second motion was made at the instance of widow Deville and Laurent Lemaitre the defendants in the principal action, and the former the plaintiff in the cross action.

In that cross action it is alleged that the Colonial Government in 1862 alienated a sum of £ 500 a portion of the land measured about 13614 square yards, in which cemetery has been made, she further alleges another alienation in 1864 for another sum of £ 1064.16s. of a piece of the land of 13614 square yards to the Continental Gas Water Company; many other alienations are alleged in the said cross action, and she maintains that her right of damage compensation is in the interest of the sums obtained by the Government for these alienations from the year 1864, and she makes out as due to her Rs. 22691.44 c.

This action has been dismissed by the Court in respect of their judgment in the other action. The Court is quite aware and approves of the law which has been previously laid down, that it would admit or reject an application to appeal to the Privy Council according as the real matter at issue is above or below the appealable amount. The Court at the same time inclining in any case of reasonable doubt to allow the appeal, is clear here that the plaintiff claims more than £ 1000 as damages sustained by the Colonial Government. As the question of the real amount of damages was not entered into by the Court, but the Court dismissed the action, it is impossible to

there being no estimation of the damages, that the real value of the action of the plaintiff is less than £ 1000, and therefore unappealable. It is true that the Colonial Government allege that only a small portion of the above alienated lands is part of the jouissance conceded to Alexander, but this is just one of the points on which parties are at issue, and as the Court has dismissed the plaintiff's case, we, in a question of appeal, must give weight to the allegations of the appellant. We therefore allow the appeal on the action in damages, subject to the usual condition relative to finding security to the amount of £ 300.

In regard to the other action, by which the Colonial Government sought to put an end in law, as an end in fact had been brought long before, to the rather peculiar right of "jouissance", it is probably certain that the value of that right to a lady who is so old that her examination had to be taken *de bene esse* by commission is not equal to the sum of £ 1000.

But in the first place, on the motion of the Government the two actions were consolidated on the 24th of October 1882, they therefore were heard together, the evidence bearing on both cases was the same, and they were disposed of by one and the same judgment; in the next place the pleas of the Government in answer to the action of damages are a repetition of the legal rights maintained in the Government's own action; these facts being so, we do not see how consideration of the case at the instance of the Government can be excluded when the merits of the action of damages are being considered, and we hold it inexpedient to refuse the motion for appeal in this case also.

Another motion was made for execution pending appeal in the event of the Court sustaining the right of appeal, as the view of the Court was that many years ago widow Deville ceased to make use of the very limited right of pasture, which she had in virtue of Alexander's concession transferred to her, and as Lemême's position of guardian of her rights was a mere point of fiction and a pretence put forward to give a colour to the case of the parties maintained in Court, and that in truth he was a mere squatter who had endeavoured to obtain on his own behalf a substantive right from the Government, but without success; we think the circumstances such as justify our granting execution pending appeal.

We therefore grant the motion of the Colonial Government to that effect.

As motions on both sides have been made which have been opposed by the other party unsuccessfully, we are of opinion that an order for costs due to or by either of the parties should not be pronounced.

### SUPREME COURT.

APPEAL FROM JUDGMENT OF FOREST LANDS PURCHASE COMMISSION. — CLAIM OF ANNUAL PERCENTAGE UPON PURCHASE PRICE FROM DATE OF VALUATION BY COMMISSION TO DATE OF DEPOSIT OF PURCHASE PRICE.

*This is an appeal from a valuation of the Forest Lands Purchase Commission fixing the value of land at Curepipe belonging to Mr Ravet at Rs 79,001.*

*The appellant Ravet contends that this sum represents the value of the land as it stood at the date it was valued, and if the Government decides to acquire it, he is entitled to this sum, plus the interest from the date it was valued until the date the purchase price is deposited.*

*Held that the Commission had power to award compensation for deprivation of the land by the owner between the date it is assessed and the date the price will be deposited.*

*Judgment remitted back to the Commission to be amended, by allowing appellant an annual percentage upon the value of the land as at date of valuation, as will indemnify him for "damage being the natural and immediate consequence of the delay which has occurred" or will occur before the final decision of "Governor respecting the acquisition of the land."*

RAVET—Appellant

versus

THE MAURITIUS GOVERNMENT  
—Respondent

• Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor A. MURE,—Second Puisne Judge

—

W. NEWTON — Of Counsel for Appellant

F. VICTOR — Attorney for the same

J.M. GIBSON, Substitute Procureur General,

—Of Counsel for Respondent

J. GUIBERT.—Attorney for the same.

—

Record No. 21,800.

14th February 1883.

This is an appeal against a Report of the Forest Lands Purchase Commission assessing the value of land belonging to the appellant, which Government is desirous of acquiring under the provisions of Ordinance No. 10 of 1881.

The Commission fixed "the Cash value of the property as it stood on the 10th May 1881" (being the date at which the land was proclaimed under article 2 of Ordinance No. 10 of 1881), at Rs. 79,004.

The appellant accepts this valuation as representing the value of his property at the date mentioned, but contends that the Commission should have found him entitled to "interest" from that date to the date upon which (if the Government decides to acquire his land), the price assessed by the Commission is deposited in accordance with article 16 of the Ordinance. In the event of the Court being of opinion that it was beyond the power of the Commission to award "interest" on the price from the date of the proclamation, then the appellant claims alternatively what he terms damages for loss of industry.

On behalf of Government it was argued that the price as assessed by the Commission, represents the full sum which the appellant will be entitled to receive, should the Government, at some future period, determine to acquire the Land, or, at any rate, that the Commission had no jurisdiction to award "interest"; and that if any question should

arise as whether interest is due on the amount awarded, it must be the subject matter of a separate suit.

With regard to the first branch of this contention, the very careful wording of the Report can leave no doubt that the Commission did not consider that the amount fixed by them was the equivalent of the value of the Land either at the date of their Report, or at some future date when the Government may finally decide to acquire the Land. Their award is couched in most precise terms, and can only mean that the amount mentioned is the value of the land as at 10th May 1881, in other words, that, had that sum been paid to the appellant on that date, he would thereby have been indemnified for the loss of his property. Were we then to hold that by depositing the amount mentioned within the delay prescribed by the Ordinance (which in this instance will not expire before June 1883), Government would discharge all claims competent to the appellant in respect of his expropriation from the Land, we should manifestly give to the award a meaning which it was never intended to bear, and of which the terms used do not admit. We must accordingly reject the first branch of the Respondent's contention.

But the real ground upon which the appellant's claim was attempted to be met by Government was, that it was *ultra vires* of the Commission to deal with any claim for interest, and that consequently no such question could competently be entertained by this Court on appeal.

On turning to the report of the Commission it will be seen that this was the view adopted by them. They say "Whether Mr. Ravet is entitled to claim interest from the Government since the 10th of May, date of the Proclamation, inasmuch as Mr Ravet, since that date has been practically deprived of his property, is a question into which the Commission has no right to enter." The ground upon which the Commission was led to this opinion, would appear to be that, by paragraph 1 & 2 of article 30 of the Ordinance, their estimation of the timber, crops and bare Land, is invariably to be based on their value as at the date of the Proclamation, and that they do not consider that either of the other paragraphs of Art. 30, prescribing the grounds upon which their valuation shall proceed, entitles them to take into consideration the prejudice which the appellant will sustain by the deposit not being made until

long subsequent to the date at which the value of the property is assessed.

If this view is a sound one, of course the appellant's claim cannot be contended by us on appeal. We must therefore inquire whether the view of the Commission that they are precluded from dealing with questions of this nature is one based on a sound construction of the Ordinance.

In considering this question it is well to observe that in the reasons of appeal and throughout the argument, the appellant's claim has been somewhat erroneously termed a claim for "interest." Interest strictly speaking is due only in respect of the nonpayment of a debt. In the present instance there is no debt due to the appellant, unless and until Government shall at some future period determine to acquire this land by paying the price as assessed by the Commission. Should the Government ultimately determine to do so, they thereby become bound within three weeks to deposit the assessed price and then, by the express provision of the law, interest will begin to run on the deposit. Prior to the deposit it is not strictly accurate to speak of interest as accruing on the assessed price. Any claim competent to the appellant is rather of the nature of a claim for compensation or damage suffered by reason of the time which must elapse between the date at which the value of the property is assessed, and the date at which a deposit must be made. The most convenient mode of allowing for this prejudice may be however by finding the appellant entitled to a certain annual *per centage* on the price between the date as at which the valuation is fixed and the date of deposit. If we examine the economy of the Ordinance, we shall find that the Legislature contemplated (article 16) that "the price assessed by the Commission" should be the amount claimable by the owner of the expropriated land, and that, (Article 17) on the transcription of the instrument recording the deposit of that price as assessed by the Commission, the land should "vest absolutely in the Crown free from all charges and incumbrances or rights of other parties whatsoever." But if this be so, one of two things must follow—either the Commission must have power in its award to make allowance for the prejudice which the land-owner sustains by being out of the value of his timber, crops, &c., and of his bare land (assessed in terms of paragraphs 1 & 2 of article 30), between the date of the Proclamation, and the date when the price is deposited by the Go-

vernment; or it must have been the intention of the legislature that no legal claim should be competent to the owner in respect of this prejudice. Now, as an appeal lies to the Privy Council, it is clear that three or four years may elapse between the date when the land is proclaimed and the date at which Government may be called upon to deposit the price as assessed by the Commission, and it is hardly possible to conceive that the legislature intended that the value of the land as at the date of proclamation should, after an interval of three or four years, during which the owner of the land has been deprived of all enjoyment of his property, be deemed a sufficient equivalent. That this was not the intention of the framers of this Ordinance seems manifest from the terms of article 18, by which, when Government decides *not* to acquire any land which has been proclaimed, provision is made for indemnifying the proprietor for any damage he may have sustained as the direct consequence of the proclamation, and also from the care (article 19) with which interest is allowed for three months on the price deposited pending its distribution by the Master. These clauses raise the strongest presumption against the theory that it was intended that the proprietor of land proclaimed, should be deprived of any claim for the loss of the use of his land between the proclamation and the deposit of the price. Compensation which would naturally be estimated at an annual *per centage* upon the sum fixed by the Commission as the value of the land at the date of Proclamation.

We cannot doubt, from the language of the award that the Commission regarded the appellant as entitled to such compensation, but as we have seen, they deemed it beyond their power to award it, and as the Government may legally acquire the land by depositing the sum assessed by the Commission, such compensation would not in their view be a legal claim, but one which in its discretion the Government might admit or reject. Such a position is so contrary to equity and to the spirit of the Ordinance, that before adopting it, we must be satisfied that the terms used by the Legislature clearly debar the Commission from making allowance for the damage suffered by the proprietor, by the loss of the use of his land between the date of the Proclamation and of the deposit.

Turning now to article 30 of the Ordinance there can be no doubt that in fixing the value of the timber and of the bare land as at 10th May 1881, the Commission carried

out their duties so far as these are defined by paragraphs 1 & 2 of the article. But were their powers thereby exhausted and were they not further required to make allowance for the prejudice sustained and to be sustained by the proprietor by being deprived of the disposal of his property between the Proclamation and the date when the Government may be required to deposit the value of the land as at its date? We think that this was a matter which they were entitled and were bound to take into consideration. Paragraph 3 of the article is clearly inapplicable, but paragraph 4 appears to have been framed for the purpose of enabling the Commission to take account of this element in arriving at their valuation. By that paragraph, the Commissioners are directed to base their valuation, not only on the value of the timber and land as at the date of the Proclamation, but also on any damage being the natural and immediate consequence of the "Proclamation" or of the delay which "has occurred or will occur before the final decision of the Governor respecting the acquisition of the land"—Now surely the loss of the power to turn to account or to dispose of this land between the Proclamation and the date of the decision of the Governor to acquire the land, and with that view to deposit the assessed price, is damage which is the "natural and immediate consequence" of the Proclamation and of the delay allowed to Government for determining whether it will, or will not acquire the land. No doubt this deprivation for a time, which may possibly be a very long time, of his rights as proprietor causes the proprietor serious damage—damage which will not be compensated by the deposit in June 1883 of the value of the land as at May 1881, and for which (under article 18) he might claim a compensation if the Government decided not to acquire his land. But if under article 18 the Commission may award the proprietor compensation for a damage which he sustains by being deprived of the use of his land between the Proclamation and the date at which the Government decides *not* to acquire it, why may they not award him compensation for the deprivation of the use of the price between the date at which it is assessed and the date at which it will be deposited?

The language of the paragraph leaves in our minds no doubt that this is one of the matters which the Commission is directed to take into consideration in framing their valuation, and as the date of deposit must necessarily be uncertain and contingent, the

most natural way in which they can give effect to this element of value is by allowing a certain annual percentage on the price, from the date as at which the value is assessed, that is from the date of the Proclamation, to the date of deposit, at which, under article 19, the sum deposited will begin to bear interest *ex lege*.

This being in our view the sound construction of the law, we shall remit to the Commission to amend its award by allowing to the appellant such an annual *percentage* upon the value of the land, as at 10th May 1881, as will, in their opinion, indemnify him for "damage being the natural and immediate consequence of the delay which has occurred or will occur before the final decision of Governor respecting the acquisition of land."

As the appellant has been successful in substantiating the first branch of his claim we shall reject his alternative claim for loss of industry.

## SUPREME COURT

### IMPRISONMENT IN DEFAULT OF PAYMENT OF DAMAGES—DECLINED.

*This is the outcome of a judgment given last year.*

*The plaintiff was the creditor of the Masonic Lodge "La Paix" which by means of a lottery had come into possession of a sum, which plaintiff claimed in payment of his debt.*

*The defendant took such steps as to place the money beyond his reach. For this act the Court held defendant and another were liable to plaintiff in damages.*

*Plaintiff now moves for imprisonment against defendant.*

*Held that this is not a case in which imprisonment should be granted, as it had not been ruled by the Court that in the previous case above alluded to, the defendant had acted fraudulently or in bad faith.*

RAYNAUD,—Plaintiff :

versus

BOHAN &amp; ors.,—Defendants

Before

His Honor E. J. LECLÉZIO,—First Puisne Judge

and

His Honor L. Cox,—Third Puisne Judge

W. NEWTON,—Of Counsel for Plaintiffs

A. LHOSTE,—Attorney for the same

L. ROUILLARD,—Of Counsel for Defendants

A. BOHAN,—Attorney for himself

Record No. 21,631

Judgment on the demand for caption of the body

JUDGMENT OF HIS HONOR E. J. LECLÉZIO

20th February 1883

I do not think that the motion which is made can be granted by the Court. The only thing that we clearly established in our judgment was that the defendants had acted illegally in what they did. They acted according to a distinction which they thought they were entitled to make according to the masonic rules and which we thought they were not entitled to make according to the rules of our civil law.

We therefore decided that as they had put out of the reach of Raynaud a certain sum which they considered was the property of the Lodge, Mr Raynaud was entitled to claim damages against them on that account, but we could not say then and we cannot say now that when they did so they acted fraudulently or that it was an act of bad faith, and therefore, I do not think that this is a case in which imprisonment should be granted.

JUDGMENT OF HIS HONOR L. COX

20th February 1883

I am of the same opinion.

## SUPREME COURT

FICTITIOUS SALE OF LAND.—VENDORS PRIVILEGE.—SALE CANCELLED.

*In October 1879 the plaintiff sold to defendant a portion of land which was to be paid for in monthly instalments. The defendant fell into arrears in the payment of the instalments, and in October 1880 sold the land belonging to him, to one Mooseerally.*

*Evidence was adduced to shew that the sale made to Mooseerally was made without consideration, and that a notary had been induced to draw up a deed that was signed by defendant and his father in law to the effect that the sale was bad. Also that defendant, since the sale, received the rents.*

*The defendant argued that the action was premature, and could only be resorted to after the plaintiff had exercised his vendor's privilege over the portion of land sold by him to defendant.*

*Held that the sale made by defendant to Mooseerally should be cancelled and annulled, and that the property in question belongs to Roopchand the defendant. Costs against defendant.*

D'AVOINE,—Plaintiff

versus

ROOPCHAND,—Defendant

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor E. J. LECLÉZIO—First Puisne Judge

H. GALÉA—Of Counsel for Plaintiff

A. ROLANDO,—Attorney for the same

T. L. JENKINS— } Of Counsel for Defendant

L. A. HUGUES— }  
H. THATCHER—Attorney for the same

Record No. 21,711

20th February 1883

This is an action in which the plaintiff seeks to have set aside as fictitious and made in fraud of his rights, a sale of certain immovable properties made by the first defendant and his wife to the second defendant.

In October 1879, the plaintiff sold to Roopchand, the undivided half of a piece of land of which the latter owned the other undivided half. The price stipulated for by the plaintiff was Rs 1000 payable in monthly instalments of Rs 33.33. In October 1880, Roopchand being then in arrear in the payment of nine monthly instalments, sold by a notarial act to Mooseerally the portions of land belonging to him, one of them being the piece of land the undivided half of which he purchased from the plaintiff. The plaintiff has adduced evidence which as regards Roopchand satisfies the Court that he has on more than one occasion admitted that the sale to Mooseerally was made without consideration, and that he has induced a notary to draw up a deed stating that the sale was bad, which was to be signed by himself and his father-in-law. The evidence further shows that since the date of the sale Roopchand has been in the habit of receiving the rent of certain parts of the land, and acting as if he were the owner of the property. As regards Mooseerally, the plaintiff has examined him on personal answers, and the statements made by him are of such a nature as to raise the most grave doubts in our minds as to whether any consideration was given by him in return for the land made over to him. He says the sale was made in payment of large sums advanced by him to Roopchand seven or ten years ago, but of such advances, which to persons in this position of life represent very large sums, no evidence has been given.

Further he admits that since the sale he has permitted Roopchand to draw the rent of the buildings on the land, and although he says the money was handed over to him, he admits he does not know what sums were paid and that he has taken what was given to him without question.

These statements are very nearly incredible, and when we take along with that his relationship to Roopchand, and his denial of a conversation with regard to the settlement of the case between them and the plaintiff, to which the plaintiff and a witness positively swear, and the evidence of DA'voine, who

states that Mooseerally said to him that his son in law had put all his property in his Mooseerally's name, we cannot avoid the conclusion that the sale is proved as regards them also to be made without consideration.

In these circumstances we must hold that the sale is fictitious and in fraud. It was indeed contended that the defendant was possessed of other property, but no evidence was adduced by the defendant to shew that they were of real value, or could serve to secure to the plaintiff the payment of the sums due to him. It was urged by the defendant that the action was premature, and could only be resorted to after the plaintiff had exercised his vendor's privilege over the portion of land sold by him to Roopchand. For this proposition however, no authority was cited, and we know of no proposition that the plaintiff is barred from taking his rights until he has tried and failed.

We accordingly find that the plaintiff is entitled to a judgment cancelling and annulling the sale made to Mooseerally, and declare that the property in question belong to Carew Roopchand, with costs against the defendant.

## SUPREME COURT

### ACTION TO OBTAIN APPROVAL OF ACCOUNTS BY AN AGENT.—ORAL TESTIMONY.

*The plaintiff was the agent of defendants as owners of the Sugar Estate "L'Union." When the Estate was sold to a company, difficulties arose as to the plaintiff's accounts, and this action was entered to obtain a judgment approving of the said accounts.*

*The issues between the two parties were reduced to two items, which the plaintiff asked to prove by oral testimony.*

*The two items were for brokerage, and for machinery for the estate.*

*Held with regard to the first item, that oral testimony could not be adduced as, the amount claimed was not in accordance with the legal tariff, and there was nothing to shew that it was probable that the plaintiff had been authorised to remunerate the broker by a fee of the amount mentioned. But plaintiff is entitled to call the defend-*

*ants upon their personal andigera, to elicit admissions which would admit oral proof.*

*Oral proof is admitted to establish the second item, as it was in part payment of an account in which the defendants had sanctioned a previous payment by the plaintiff. Costs reserved.*

—  
BASSET,—Plaintiff

versus

CONSTANTIN & OTHERS,—Defendants

—  
Before

His Honor Sir ADAM GIB ELLIS Kt — Chief Judge

His Honor E. J. LECLÉZIO,—First Puisne Judge.

—  
W. NEWTON,—Counsel for Plaintiff  
P. F. LASTELLE,—Attorney for the same

L. ROUILLARD,—Counsel for the defendant  
E. LAURENT,—Attorney for the same

—  
Record No. 21,724

20th February 1883.

The plaintiff in this case was formerly the agent in Port Louis of the defendants as owners of the sugar Estate "L'union." Mr Basset's agency recently came to an end by the sale of that Estate to a partnership styled the "L'union Sugar Estates Company"; it would appear that difficulties arose with reference to the plaintiff's accounts as agent, and that the present action was accordingly instituted for the purpose of obtaining a judgment approving the account as rendered by the plaintiff.

\* During the course of the action, the issues between the parties have been materially narrowed, and the *only* questions remaining for our consideration is relative to two *items* in the account viz :

In a sum of Rs 6000 with which the plaintiff debits the defendants, as the amount paid

by him as a Broker's fee in connection with the sale of the Estate to the company, and 2nd a sum of Rs 1373 appearing in the account as having been paid to Messrs Duchenne & Co to account of a larger amount due to them for machinery supplied to the Estate. To both of these *items* the defendants object, and maintain that they never authorized the plaintiff to make such payments, and that the plaintiff is not entitled to credit himself with these amounts in his account as agent.

The plaintiff has filed a long notice of facts which he asks to prove by oral evidence. The defendants object on the ground that most of the facts detailed in the notice cannot competently be proved by the evidence of witnesses, and the question which we are now called upon to determine is whether the plaintiff has established such a "Commencement de preuve par écrit" as will entitle him to adduce oral testimony.

From the argument submitted to us the practical questions appear to resolve themselves into these, — whether the written evidence before us emanating from the defendants renders it probable ("vrai semblable") that the *items* mentioned were disbursed by plaintiff within the scope of his authority as agent.

10. With reference to the sum paid to Duchenne & Co. we find that in the account before us, the plaintiff has debited the defendants with another *item* of Rs 1000 paid to account of sums due to the same people for machinery. As the defendants have now approved and accepted the plaintiff's account, except as regards the two *items* above mentioned, and as it is not even alleged that this payment of Rs 1000 was specially authorized by them, we think that their approval of the one *item* renders it likely that the other payment of Rs 1373 was a disbursement falling within his powers as agent.

20. The other *item*, that of Rs 6000 paid to Alphonse Boulé fils as Brokerage in connection with the sale of the Estate "L'union" to the Sugar Estates Company, stands in a somewhat different position. The bordereau drawn up by Mr Boulé in connection with the sale, mentions that the negotiation was carried out "par l'entremise de Monsieur A. Boulé fils Courtier juré et agent de change."—This document is signed by Mr Jules Constantin, one of the defendants, and contains the statement that in executing the deed, he,



Mr Constantin, acted both in his own personal name and in the name of the other defendants. As a regular act of sale, in similar terms, was subsequently executed by the defendants, we think that these documents render it likely that with the defendants' concurrence and authority, Mr Jules Constantin employed the services of Mr Boulé as broker in connection with the sale of the Estate, and that remuneration is due to him for his services as such. But we are unable to find in the documentary evidence, any thing which would lead us to the conclusion that the defendants consented that Mr Boulé should receive the amount mentioned, Rs 6000. By ordinance No. 11 of 1836 and the relative Tariff of Brokers fees and charges, the amount which Brokers may exact or receive as fees, is fixed and determined, and this being so we must presume (in the absence of any special agreement) that the intention of parties was that Mr Boulé's services should be recompensed at the rate fixed by the Tariff.—In the present instance, there is nothing to suggest that any special agreement was entered into with regard to the amount to be allowed to the broker, for the fact relied on by the plaintiff, that on a former occasion a larger fee was given Mr Boulé for his services than that to which he would have been legally entitled, does not appear to us to render it probable that a special agreement was made in this case. Further various receipts produced for items which the defendants do not dispute were properly disbursed by the plaintiff, render it likely in our opinion that the plaintiff was entitled to settle and to debit the defendants with any amount which Mr Boulé could claim as his broker's fee, in connection with this transaction. On the documents before us, therefore while we think that brokerage at the legal tariff might properly be disbursed by the plaintiff, and figure in his account as the defendant's agent, we do not think that the plaintiff is entitled to go into oral evidence, for the purpose of showing that the defendants, acting through Mr Jules Constantin, consented to remunerate Mr Boulé's services by a fee of the amount mentioned in the account.

In the event of our rejecting the documents as constituting a "commencement de preuve" rendering likely the existence of a special agreement, the plaintiff reserved his right to submit argument for the purpose of shewing that custom, could, and had abrogated the provisions of the Ordinance of 1836, and of calling the defendant's on their personal answers in order to elicit from them

admissions which would let in oral proof. These courses are of course open to the plaintiff.

On the whole matter as at present advised, we must refuse to admit oral evidence for the purpose of showing an agreement by the defendants to pay brokerage to the amount of Rs 6,000, but admit it to establish that in making a payment of Rs 1,373 to Duohende & Co., the plaintiff acted within his authority as agent.

Costs in the meantime reserved.

## SUPREME COURT

ACTION FOR POSSESSION OF IMMOVEABLE PROPERTY—FICTITIOUS SALE—MINORS BOUND BY DECLARATION OF THEIR DECEASED MOTHER.—DIVISION OF COSTS.

*In this case the plaintiff asks the Court to decide that he is the owner of an undivided half of certain portions of land at Flacq, and of an immoveable property in Port Louis, because the sale alleged to have been made by petitioner was a fictitious sale. Some of the defendants who are minors deny that the sale was fictitious or a fraud, but it was admitted by their counsel that they were bound as heirs of their late mother.*

*The Court held that on account of certain declarations made by the mother of the minors, judgment should be given for plaintiff.*

*Half the costs of plaintiff to be paid by defendants, as they did not qualify their plea.*

*With regard to defendants of age who abided by the decision of the Court, held that they should recover half their costs only from plaintiff, as they should have qualified their consent.*

SINNAPIN,—Plaintiff

versus

APPOU & qrs.—Defendants

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor E. P. LECLÉZIO—First Puisne Judge

H. GALÉA,—Of Counsel for Plaintiff  
L. WOHRNITZ,—Attorney for the sameW. NEWTON,— } Counsel for defendants  
A. BOUCHERAT,— }  
E. SAUZIER,— }  
N. SICARD,— } Attorneys for the same.  
E. E. MARGEOT,— }

Record No. 21,745

20th February 1883.

This is an action in which the plaintiff asks the Court to decree that he is the owner of certain portions of land at Flacq and of an immoveable property in Port Louis, because the sale alleged to have been made by plaintiff was a fictitious sale. Some of the defendants, who are minors and represented by their guardian, deny that the sale was fictitious or in fraud, but in Court the learned Counsel who represented them admitted that they were bound as heirs of their mother, on account of a certain declaration made by the latter before her death, so we think that judgment should be entered on behalf of the plaintiff for the undivided half of the properties claimed by him; and that he is also entitled to recover half of his costs as the defendants have contributed to that half by not qualifying their denial in their plea. With regard to the defendants who were of age, who were called in the case by the plaintiff, they have filed a plea abiding by the decision of the Court, and we think they are entitled to recover half of their costs against the plaintiff, and we give only half of the costs in their favor; they should also have qualified their plea by giving their consent. We think that parties who are of age, should not when they have responsibility to incur and when they have the necessary documents to allow them to qualify their plea, come here before the Court and give purely and simply the plea of abiding by the decision of the Court.—Distriction of costs in favor of Wohrnitz, plaintiff's attorney.

## SUPREME COURT

CLAIM OF LAND. — PRESCRIPTION OF TEN YEARS WITH A BONA FIDE TITLE UNDER PRIVATE SIGNATURES WHICH HAD NEVER BEEN TRANSCRIBED—IN ABSENCE OF TRANSCRIPTION, PRESCRIPTION DOES NOT RUN.

*In May 1882 the plaintiff purchased a portion of land of 2 acres at "Cent Gaudettes" at the Bar of the Master's Court. On finding the defendant in possession of part of the land, he appealed to the Supreme Court for a writ of habere facias possessionem, but as the defendant alleged that he possessed good title to the land, the Court directed the plaintiff to enter a principal action to recover the land he claimed.*

*In the present action the defendant alleges that he inherited the portion of land he occupies from one Dinally, who purchased it in August 1871, and that Dinally and he have held the land ever since. He pleads prescription, i. e. 10 years bonâ fide possession.*

*In the defendant's title, which is under private signatures, it is alleged that the land sold forms portion of a larger plot of land purchased by Mrs Victor Amédée at the Bar.*

*It was shewn that this description was incorrect, and that the land in possession of the defendant was not a portion of that purchased by Mrs Amédée, but was a portion of that purchased by the plaintiff. On the other hand it was shewn to the satisfaction of the Court that the land intended to be sold was that actually occupied by the defendant.*

*On behalf of the plaintiff it was urged that as the defendant's title was not binding upon third parties and that his plea of prescription was not good in law.*

*Held that as defendant's title had not been transcribed he could not plead prescription.*

*Defendant ordered to give up the land with costs.*

PORTAL,—Plaintiff

versus

BOODHOO,—Defendant

France and that of the text of our own Ordinance of 1863, to say that transcription is not necessary in order to invoke prescription of ten years. Were we to hold such a doctrine, we would certainly defeat one of the objects aimed at by the law of transcription.

With regard to the distinction made by Messrs Rivière and François we think that it is due to the misconception on their part, that in the case of a purchase *a non domino* "ce n'est pas le titre qui est translatif, c'est la prescription." This is only a *petitio principii* because prescription of ten years is not, as prescription of thirty years, based on possession alone, but upon possession accompanied with a past title, that is to say a title which is not null for "défaut de forme" (art. 2267) or what is the same thing, which is not affected with a defect rendering it null with regard to those to whom the exception of prescription is opposed.

We will ask with Demolombe: "Est-ce que le juste titre en matière d'usucapion n'est pas celui-là seulement qui peut être opposé comme translatif de propriété aux tiers qui ont des droits sur l'immeuble?" and we think Flandin is right when he says: "Je n'aperçois pas, quant à moi, de motif à cette distinction, et je me demande pourquoi on s'attacherait avec cette sévérité au texte de l'article 2265 au lieu de décider que la loi du 23 Mars 1855 a implicitement modifié cet article comme elle a modifié l'article 1583."

Being of that opinion, we think it useless to examine whether Dinally purchased *a non domino* or not, and as the title of the defendant was never transcribed, whilst that of plaintiff altho' posterior in date, has been duly transcribed, we must apply the law of 1863 and decree that the defendant cannot invoke his possession of ten years against the plaintiff. The defendant is hereby ordered to quit and abandon the plot of ground in dispute and deliver possession of it to the plaintiff with costs.

### SUPREME COURT

CLAIM OF REMUNERATION FOR SUPERVISING THE UNLOADING OF A VESSEL AND DAMAGES FOR BEING DISCHARGED BEFORE COMPLETION OF THE WORK.

*The plaintiff was engaged by the defendant as overseer to unload a wrecked vessel, the*

*"Clan Campbell." After working 14 days he was discharged for alleged misconduct. The plaintiff claims remuneration for the time he was employed, and damages for being deprived of the work he had been engaged to perform.*

*From the evidence it appeared that the plaintiff was to engage men who were to be paid by the defendant. The defendant in order to secure competent men consented to pay each man Rs 3 a day, and a certain sum of money was advanced to the plaintiff by the defendant to pay the men he had engaged.*

*The plaintiff engaged men at less than Rs. 3 and pocketed the difference. The men learning this declined to work under him, and for this he was discharged by the defendant.*

*Claim of damages rejected.*

*With regard to the remuneration due to the plaintiff for the 14 days that he had been employed, the defendant had allowed him Rs. 5 per day. The Court held that this was insufficient and ordered that in settling plaintiff's account he should be allowed Rs. 10 a day for the time he was employed.*

*Plaintiff to pay half defendant's costs.*

CÉSAR,—Plaintiff

versus

ANTELME,—Defendant

Before

His Honor Sir A.G. ELLIS, Kt. —Chief Judge

and

His Honor E. J. LECLÉZIO,—First Puisne Judge

T. L. JENKINS—Of Counsel for Plaintiff  
P. F. LASTELLE,—Attorney for the same

W. NEWTON—Of Counsel for Defendant  
E. SAUZIER,—Attorney for the same

Record No. 21,813

23rd February 1883.

In this action the plaintiff alleges that he was engaged by the defendant to unload the cargo of the wrecked steamer "Clan Camp-

bell" which had been purchased by the latter, that after he the plaintiff had partly executed his engagement he was improperly dismissed by the defendant, and on these allegations he claims damages for the loss which he sustained in being prevented from carrying out his engagement to its conclusion, and a further sum as the remuneration due to him for work and labour done under the engagement.

The defendant pleads that no engagement was ever entered into between him and the plaintiff, and further, assuming such an engagement existed, that it was not put an end to by the fault of the defendant.

With regard to the first point, the existence of a contract or engagement between the plaintiff and the defendant, we think that the evidence is conflicting and that the conduct of the defendant coupled with the terms of certain receipts taken from the plaintiff by the defendant, and an account made out by the defendant and handed to the plaintiff, may justify the latter in considering that an engagement had been concluded between them.

We shall assume therefore that the contract or engagement was made between the parties, and proceed to inquire whether the circumstances under which it came to an end, justify the plaintiff's claim for damages for the prejudice which he alleges were thereby caused to him.

The arrangement between the parties was that the defendant was to defray the wages and keep of the men to be engaged by the plaintiff and generally all outlay, and that the plaintiff was to be remunerated for his time and services after the operation had been concluded. The amount of remuneration to be given to the plaintiff was not however specified. After some discussion, and after taking the opinion of the manager of one of the Dock Companies, as to what wages it would be necessary to give to the labourers for the particular description of work, the defendant consented to wages at the rate of Rs. 3 per day, being given to the men, and as the plaintiff represented that the men would demand a portion of their wages in advance, a sum of Rs. 24 per man to be engaged was handed over to the plaintiff.

The real issue between the parties being upon what was the precise agreement between

the parties as to the engagement and payment of the men.

The plaintiff contends that the arrangement was that the defendant should give him (the plaintiff) Rs. 3 per man per day's work, and that he the plaintiff was to be entitled to engage the men at what rates he thought proper, and to retain any difference between the Rs. 3 per man per day, and the wages that he found it necessary to pay the men. On this footing, he claims as damages for the breach by the defendant of his engagement, Rs. 3 per man's day's work done in connection with the wreck, both before and after his alleged improper dismissal. The defendant on the other hand maintains that in agreeing to give Rs. 3 per man per day's work, it was understood that that sum was necessary to secure the services of competent men, and that it was never contemplated or intended that the plaintiff should be entitled to hire men at a lower rate and retain the difference between what he, the defendant, engaged to give and what the plaintiff might find it necessary to pay.

The importance of determining which of these conflicting views of the arrangement is the correct one result from this, that the evidence leads us unhesitatingly to the conclusion, that the plaintiff's employment was brought to an end owing to the dissatisfaction felt by the men, on learning that they had not received the advances which the defendant's agent informed them had been made on their behalf to the plaintiff. On learning this, they considered that they had been deceived and ill-treated by the plaintiff, and refused any longer to work under him, and the defendant thereupon informed the plaintiff that, as the men would not work under him, he might go; that he might take with him any men who chose to go with him, while he the defendant would retain any men who preferred to stay and work under a new overseer.

Now, if the understanding of parties was that he agreed on wages and advances were to be given to the men whom the plaintiff engaged, and that he was not entitled to pocket the sum advanced and hire men at any lower rate which he thought proper, then, as his violation of this understanding was the immediate cause of the termination of his connection with the operations in connection with unloading the "Clan Campbell", we are clear that he cannot found upon what occurred as a breach of his engagement or

claim what, on that hypothesis, he was never entitled to, Rs 3 *per man's day's* work done in connection with the operation.

After careful consideration of the evidence we are of opinion that it was never the intention of parties that the plaintiff should make a profit and (as appears from the evidence) an immense profit, from the engagement of the men.

The terms of the agreement are clear. On the one hand the plaintiff was to hire men from the work to be done, and to devote his care and skill to superintending it.

On the other the defendant was to pay and support the men, and at the conclusion of the operation to remunerate the plaintiff for his time and trouble. It can never have been the intention of parties that in addition to the stipulated remuneration the plaintiff was to be at liberty to keep as his own, the difference between the high rate of wages which the defendant was informed by the plaintiff was necessary to secure the services of competent men, and the wages at which the plaintiff could manage to pick up men. Such an arrangement would have placed the plaintiff in a position where his private interests would conflict with his interest to his employers, and would tempt him, for his own advantage, to accept incompetent men at a low rate of wages, while his duty to his employer demanded that he should engage the best men procurable at the rate agreed on.

We cannot believe that the defendant consented to such an arrangement, as the termination of the plaintiff's employment in connection with the wreck, was the immediate consequence of his violation of what we hold to have been the agreement between parties in this respect, we must necessarily reject his claim for damages.

The plaintiff further asks, as we have seen, for remuneration for his services, in superintending the unloading of cargo between the 16th and 29th October, say 14 days. Although we have held that his ceasing to be employed results from his own act and does not entitle him to claim damages, we think he is entitled to remuneration for his services during this period of fourteen days. The defendant, in the account prepared by him, proposed to allow him 13 days work at the rate of Rs 5.

This however we deem quite inadequate

remuneration looking to the nature of the work. We consider that the plaintiff is entitled to receive as fair remuneration Rs 160 being at the rate of Rs 10 for each week day and Rs 20 for each of the two Sundays falling between the 14 and 29th October inclusively.

The accounts between the parties will then stand as follows :

Payments made by plaintiff to the men.....	Rs 388.50
A sum expended by him for travelling &c.....	69.64
Remuneration for his labour and services .....	160.00
	<hr/>
	Rs 618.14

which being deducted from the sum of ..... Rs 630.00 advanced to him by the defendant, will leave a balance due by Plaintiff of ..... Rs 11.86

The action must therefore be dismissed.

As the plaintiff has been unsuccessful on one of the main issues, the trial of which involved costs, we must find him liable in half of the expenses of the defendant

## SUPREME COURT

LEASE OF PREMISES CLAIMED UPON A LETTER ADDRESSED BY DEFENDANT TO PLAINTIFF—LETTER DOES NOT CONTAIN OBLIGATION "DE DONNER" OR DELIVER, ACCORDING TO ARTICLE 1136 CIVIL CODE—ACTION IN DAMAGES MAY LIE.

*The plaintiffs in this case were the occupiers of premises in the town of Port Louis belonging to the defendant. During their occupation a higher rent than they paid was offered for the premises by a third party. The plaintiffs addressed the defendant who was in France applying for a lease of the premises, they were informed that if they consented to pay the higher rent, the defendant's agent here had been instructed to give them a lease of the premises.*

*The defendant pleaded that the lease had been offered to them, but they had declined to, give the higher rent offered by the third parties alluded to.*

*Held that the defendant's letter does not contain an unconditional obligation "de donner" or deliver according to article 1136 of the Civil Code, that the action is incompetent in its present form; the plaintiffs may amend their declaration and claim damages, if the defendant refuses to sign a regular lease in their favor within a certain delay, if they are advised to do so.*

CAILLAUD FILS, FRÈRES,—Plaintiffs

versus

AVIRAGNET JEUNE—Defendant

Before

His Honor E. J. LECLÉZIO,—First Puisne Judge

and

His Honor A. MURE,—Second Puisne Judge

T. L. JENKINS,—Of Counsel for Plaintiffs  
V. DUCASSE,—Attorney for the same

G. GUIBERT,—Of Counsel for Defendant  
F. ROBERT,—Attorney for the same

Record No. 21,849

23rd February 1883.

In this action the plaintiffs seek that the defendant, represented in this Colony by G. Chauvet broker, should be ordered to enter into an authentic deed of lease of certain real property in Royal street, Port Louis, and if the defendant neglected to do so that the judgment of the Court should be considered as a regular valid and authentic deed of lease. The defendant is resident in Paris and his agent here Mr Chauvet having received an offer for the premises occupied by the plaintiffs at a much higher rent, difficulties arose between the plaintiffs and Mr Chauvet, and the former applied to the defendant by letter addressed to him in Paris.

In defendant's answer to plaintiffs, which

is dated 8th December one thousand eight hundred and eighty two, he says: "I write to Mr Chauvet my agent to give you the preference in the letting of the premises," and after some general remark the letter concludes: "Si donc, messieurs, vous êtes disposés à payer le prix qui vous est offert Mr Chauvet a l'ordre de passer avec vous un bail de deux ans." The defendant alleged that before that letter reached Mauritius, they had in consequence of the plaintiffs' refusal to pay the increased rent, entered into a contract of lease with Messrs Dupin, Morel & Co. the notarial lease in virtue of this contract was subsequently, on the 19th January one thousand eight hundred and eighty three, executed between the parties, defendant's agent and Dupin fils and Morel & Co.

In Court the defendant moved to be allowed to prove by parol evidence, that his agent Chauvet had offered to the plaintiffs to lease to them the premises which they already occupied for three years at the price tendered by Dupin, Morel & Co., and that the plaintiffs having refused that offer, the defendant's agent then immediately accepted the offer made to him by Dupin and Morel. This motion was objected to by the plaintiffs.

The letter of Aviragnet to Caillaud does not constitute nor is it equivalent to a perfect contract of lease; it conveys merely the assurance that upon the facts stated to him by the plaintiffs they ought to have the preference at the same price, and that instructions are sent to that effect to his agent here.

The letter does not therefore contain an unconditional obligation "de donner" or deliver according to article 1136. We think the obligation taken in the letter is only one which might render the defendant liable in damages, if he persists in refusing to sign the deed of lease with the plaintiffs, and if it is shewn that he is in fault in so refusing.

Besides we are in presence of a regular lease contracted in favor of a third party, against whom no allegation of fraud is made and who is not even called in the cause.

For both reasons it would not be possible for us to give a decree in the manner we are asked to do. What would be the practical result of the judgment we are asked to give, if after examining the facts we were inclined to consider that the defendant is at fault and ought to sign a regular deed of lease in favor of plaintiffs? it would create another con-

tract of lease without annulling the one already existing in favor of Dupin and Morel. Such a result shows that the conclusions of the demand are not what they ought to be.

We think that we must therefore declare this action incompetent in its present form, unless the plaintiffs amend their conclusion (if they are advised to do so) by stating that in case the defendant refuses to sign a regular deed of lease in their favor within a certain delay he should be condemned to pay a certain amount of damages to them; if within a delay of eight days the plaintiffs have not made this amendment they may elect to be non suited.

It is unnecessary to examine the question of parol evidence at present.

### SUPREME COURT.

APPEAL FROM DECISION OF FOREST LANDS PURCHASE COMMISSION—DAMAGE DONE TO REMAINING PROPERTY OF OWNER—POSSIBILITY OF CONVERTING PROPERTY INTO A SUGAR ESTATE—INDEMNITY FOR DEPRIVATION OF PROPERTY.—ALLEGED ERROR IN MATTERS OF FACT BY COMMISSION.—ORD. 10 OF 1881.

*This is an appeal from a valuation of the Forest Lands Purchase Commission, of a portion of land in the District of Moka and known as "Belle Rive."*

*The land was proclaimed on 10th May 1881 and valued by the Commission at the sum of Rs 159,117.*

*The plaintiff alleged that the Commission had erred in matters of fact, that the land had been undervalued, that no indemnity had been allowed for the damage done to her remaining property by the subtraction of a large portion thereof, that the possibility of converting the property into a sugar estate had not been allowed for, and finally that nothing was allowed for "Interest", or indemnity to the Plaintiff for the loss of use of the land from the date it had been proclaimed.*

*Held that on the ground of error, to allow the Court to act it must be clearly made out that serious error had been committed by the Commission, causing serious prejudice, this had not been done.*

*That no indemnity was due for damage done to the remaining property of the owner, and that the possibility of converting the land into a sugar estate was too remote.*

*The question of interest was not discussed by the parties, the matter was left to the Court, having regard to the recent judgment in Ravel's appeal.*

*As it was not shewn that the plaintiff had suffered prejudice the Court directed the case to be heard again on this point of her claim.*

Before

His Honor E. J. LECLEZIO—First Puisne Judge

and

His Honor A. MURE—Second Puisne Judge

WIDOW DIORÉ—Appellant

versus

THE GOVERNMENT—Respondent

W. NEWTON—Counsel for Appellant  
V. BOULLE—Attorney—for the same

J. M. GIBSON, Substitute Procureur General,  
—Counsel for respondent  
J. GUIBERT.—Attorney for the same

23rd February 1883.

Record No 21,851.

This is an appeal from a valuation by the "Lands Purchase Commission" under article 15 of ordinance 10 of 1881, of a piece of land of 945 acres in extent, part of a larger Estate of 1800 acres, situate in the upper part of the District of Moka and known under the name of "Belle Rive" and of which the appellant has declared herself the owner. The land was proclaimed on the 10th of May 1881, and of the 945 acres, which the Government has

clared its intention to acquire, 485 acres are actually under cultivation, and 510 acres have never been cultivated and are now covered with good or brushwood. Most of the cultivated portion has been leased to the proprietors of the neighbouring Estate of "Hermitage" and the various leases have still six years to run before they expire. As the virgin forest has been cut down at some anterior period, the exact date of which does not appear, and has been removed, good macadamised roads have been made through "Belle Rive" which facilitates its examination, and adds somewhat to its value. It was purchased by the appellant from Mr J. H. Finniss in April 1879 for the sum of Rupees 180,000, which gives a price of exactly Rupees 100 per acre. It is explained that this sale was a compulsory one on the part of Mr Finniss, that is to say, circumstances compelled him to part with his land at a cheap price,—he had to raise money immediately to pay a mortgage which had been called up, and to his mind there was no alternative but a sale, and that sale took place at a low price, but Mr Finniss himself thinks that a fair price would have been Rupees 180,000 to Rupees 200,000, and there is thus an exact test of the supposed loss which he made in selling. He would have considered his Estate well sold if he had received Rupees 50,000 more than he actually did receive.

The Commission have now valued the land they have taken and the various items of claim which the appellant has made, thus :

22 acres of reserve at Rs 20 . . .	Rs 440
425½ acres cultivated portion at Rs 180 . . . . .	76590
497½ acres uncultivated portion at Rs 150 . . . . .	74625
Wood 2487½ cords at Rs 3 . . . . .	7462

Rs 159117

This is the value of the portion of Mrs Dioré's land wanted by the Government. There remains in Mrs Dioré's hand 355 acres of land which have been cultivated and which lie adjacent to the Estates "Hermitage" "Valetta" and "Highlands", and if to these 355 acres we assign the same value of Rupees 180 as the Commission has done to the other portion of cultivated land we have to add to the above sum of . . . . . Rs 159117 the additional sum of . . . . . 63900

Rs 223017

which gives to the appellant a profit on her transaction within two years of Rupees 93,017. It is apparent that the appellant

must make her claim for a largely increased value of her land above that which the Commission has allowed, to be very clear and certain and that if any doubt exists about the value of her land, she has no reason to complain of the result to which the Commission has come.

The Court recognises the difficulty of the task which the Commission has to perform. In Great Britain landed property is generally let on lease, and has been for centuries, and an easy test of its value is supplied by estimating the price at so many years of the annual rent, but in Mauritius most of the land is in the possession of the proprietors themselves, and the only crop generally raised on the land is that of sugar, which is attended with great risks and uncertainty, so that there is no easy test of the value of land, and the evidence of witnesses is very various. We have no doubt the witnesses all speak honestly and conscientiously, but looking at the subject each from a special point of view, they put a very different value upon it. The witnesses for the appellant and claimant are gentlemen who are successful planters, they accordingly place the price of "Belle Rive" at a high average, and one is not surprised to see them estimating the value of the land now in question at 300 to 400 Rupees per acre. On the other hand the witnesses for the Government name a very different figure; one of them thinks that the maximum value of the land is Rupees 110 per acre including the wood, and that it would be a bad bargain even at that price, this opinion being based on the facts that the soil was not good, the canes and vegetation poor, and that a heavy expense would be incurred in bringing into cultivation the land, which has still to be broken up. Another witness the manager of an Estate in the neighbourhood who is acquainted only with the cultivated portion, values it at Rupees 150 to rupees 160 per acre—a third of these witnesses estimates that the best part of the land being one third of the whole, should be valued at Rupees 170 per acre, and that the rest being two thirds of the whole, at Rupees 110 per acre. A fourth witness who knows the cultivated land thoroughly thinks that as a whole "Belle Rive" is not of first quality, but though the soil is compact in some localities, red gravel abounds in it, which is a sign of inferior soil, where one kind of canes only can grow, this witness estimates the land at a value of Rs 150 to Rs 160 including the wood, he appears to have been unwilling to express any opinion about the cultivated portion but as roads and drains had been made in it, he



thinks it might be worth about Rs 200 per acre, and he says that in his opinion, it is a matter of chance whether at that rate, if converted into a Sugar Estate, it would succeed. The former proprietor of the land who had sold his right only in 1879 and had been owner for 20 to 25 years prior to that date values the bare land of "Belle Rive" at Rupees 140 to Rs 150 per acre, this witness appears to know the whole land thoroughly, and is able to form an estimate of what can be made of it.

One ground of the claim of the appellant the Court has no hesitation in rejecting, she claims a high rate per acre chiefly because "Belle Rive" is large enough to be made into a Sugar Estate, and she presents that as the chief reason of the high value which she now claims. But in the first place she found a great portion of the cultivated land was let upon lease when she bought it. She has deliberately renewed the leases of about 400 acres of the land which have still 6 years to run. There is no evidence to show that before the proclamation the appellant ever manifested any intention of converting "Belle Rive" into a Sugar Estate. On the contrary her acts point in the opposite direction, such as her offer to the Government in 1879 and her renewal of the leases. In face of these facts, the possibility of turning "Belle Rive" into a Sugar Estate seems too remote and uncertain to afford a test of the present value of the land, and we are of opinion that this part of the claim must be left out of consideration altogether.

Though the members of the Commission have differed upon the valuation of the land, yet as a body they seem to have been unanimous on the quality of the soil, and the kind of vegetation which it was actually producing at the time of their inspection. They seemed to have carefully examined during two whole days these points, and the result to which they came is thus expressed: "In the opinion of the Commission, the soil of Mrs Dioré's land is poor with the exception of one spot in the cultivated part of Mrs Dioré's land, the Commission found every where red gravel, and as a confirmation of an opinion expressed by some of the witnesses, that red gravel indicates a poor soil, the Commission saw in that part of Mrs Dioré's property which was free from red gravel canes much superior to that it saw in other places, the cultivation of the portion of the land under valuation which is still held in lease by the Estate "Hermitage" appeared to the Commission to be good. The fields being free from weeds and the canes well trimmed. There were no traces of "binages" having been made, the Commission could not see to what extent guano had been applied. But the property being in proper order and in the hands of a rich firm, the Commission has no reason to assume that the canes had not been fairly cultivated, and yet the canes were in many places poor; in other places they could hardly be termed fair. If the soil had been naturally good, the canes having been fairly cultivated as proved by Mr Chasteau the manager of "Hermitage," would undoubtedly have presented a very different aspect. The soil of the uncultivated portion of Mrs Dioré's property is pretty nearly the same as that of the cultivated portion."

This is the result of a careful inspection of the soil and vegetation made by a body of experts accustomed to estimate the value of land. A careful reading of the evidence convinces the Court that the above estimate is not unfair in itself and is not inconsistent with the testimony of most of the witnesses who expressed an opinion on these points; that being so it is impossible to consider "Belle Rive" as an Estate with a soil of first class quality in which every element is united to produce an undoubted good result.

The appellant has herself afforded a strong proof of what she in truth considers to be the value of her land; shortly after she became the owner thereof in 1879, she addressed a letter to the Governor of this Island, in which she proposes that the Government should purchase the unleased portion of her land from her at the rate of Rs 140 per acre and that inclusive of the wood, she further narrates that the 700 acres of the land leased to the proprietors of "Hermitage" gives a rent which represents a sum of Rs 175 per acre or there about, and she gives this as the value of the cultivated portion of her land. It is in evidence that land did not increase in value between 1879 and 1881 in that part of the Island. Looking to the terms of this letter and considering that the appellant must have been asking the highest price she possibly could ask for her land, it is impossible to accept as just and correct her present claim of Rs 300 per acre for her land. The question which the Court has to determine is whether such a case has been made out by the appellant, as entitles the judges to interfere with the appreciation of the Commission on a question of

facts. It true that upon the ultimate value of the land the result was carried only by a majority of the commission but still it was a majority and upon matters on which men may differ, the opinion of the majority ought not to be easily thrown aside. To that must be added the views of the majority of the witnesses, men who though not neighbours of "Belle Rive" Estate, yet have large experience in the cultivation of sugar Estates, and in all the elements which go to constitute value of land in this Colony estimate the price of the land, one at Rupees 110, a second at Rupees 140 to 150, a third at Rupees 150 to 160, a fourth at Rs 110 to Rs 170 and the fifth at Rs 150 to Rs 160 including the wood. Then there must be thrown into the scale the appellant's own act in estimating the value of the uncultivated portion of the land including wood at Rs 140 and of the cultivated land at Rs 175. We further think it of importance to notice that this Court of appeal is asked to hold that the Commission has erred in a matter of fact; we do not hesitate to say that to justify the interference of this Court it ought to be clearly made out that serious errors causing tangible prejudice have been committed. But this we cannot perceive and on the grounds above stated we cannot take that view of the present appeal, and we do not hesitate to confirm the report of the Commission on the value of the land.

On the question of severance the enactment of the Ordinance is to the following effect (Par : 3 art. 30 of ord. 10 of 1881). "The valuation of land under this ordinance shall be based upon any diminution in value of the remainder of the land or estate belonging to the same proprietor caused by severance of the land to be acquired."

The true interpretation of this clause appears to mean that if the portion of land or estate left in the hands of a proprietor is diminished in value by severance from the land valued and to be taken by the Government, an additional value equal to the loss so caused is to be given to the claimant.

The question now to be disposed of may be thus simply put. Is loss caused to the appellant by the Government taking 945 acres of her land and leaving 355 acres in her possession? In considering this question we discard altogether the supposition that a Sugar Estate could be easily made out of "Belle Rive" as a whole as we have said before, we regard this as purely speculative and too remote and distant a possibility to give any tan-

gible ground for estimating the present value of the subject. This element being eliminated, the next consideration is that the appellant gets, as must be presumed, its true value for the land which has been taken, and has a portion of land left to her which is intersected by a good macadamized road, and is the part of her land nearest "Hermitage" and "Highlands", and not far from "Valetta." That being so is it possible that the remaining portion can be diminished in value by being severed from the rest? It is admitted that as land needs rest in order to fertilize it, there is a tendency for estates to acquire additional land. Further it would appear that the appellant's land is the only property in the whole neighbourhood which can be acquired by any of the adjacent Estates. It is further possible to create competition immediately for this piece of land, as more than one witness points out, by advertising the appellant's intention to parcel it out in small lots, and as the available land in that quarter is much reduced in quantity, it is difficult to see how the appellant will be prejudiced by the alleged severance. On this subject therefore, though we admit the question is a delicate one, we have also come to the conclusion that we cannot interfere with the judgment of the Commission.

We came now to the question of interest, which was not discussed by the parties in respect of the recent judgment of the Court in Ravet's appeal, but upon which the Substitute Procureur General requested our judgment. The matter of interest was left with the Court. It was taken for granted by both sides, that in consequence of a previous judgment, interest or rather as we would say compensation would be found due. But this case differs essentially from the preceding. In the former case Mr Ravet had been stopped by the proclamation in the midst of his industry of cutting down a forest, and the Commission calculated that a period of four years would be occupied in doing so, if he had carried out his intention without the intervention of the Government, and they deducted interest for two years from the whole estimated value, because he would realise his profits sooner than he would otherwise have done. In the present case the cultivated portion of the appellant's land is under lease, and the rent due under these leases will be, we presume, paid to the appellant until the decision of the Government in Executive Council is given. Is she entitled to interest on the value of this portion of the land? Again has the appellant's use of the remainder of the

land which is covered with wood and brush-wood been effected by the proclamation? Did she make any use of it before that and has her use of it been affected subsequently. We feel that these questions call for discussion and as the parties took for granted that the present was ruled by the former decision, we appoint the case to be again heard before the Court on this head of appellant's claim.

### SUPREME COURT

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE OF PORT LOUIS.—POINT RAISED BY COURT MENTIONED IN GROUNDS OF APPEAL.—CASE TO BE RE-ARGUED.

*This is an appeal from a conviction of the Junior District Magistrate of Port Louis.*

*The appellant, was charged with having aided and abetted in a larceny. He denied the charge, was found guilty and was condemned to six months imprisonment; against this decision he appeals.*

*On reviewing the information and conviction the Court found an apparent difference between the charge contained in the information and that of which the Magistrate convicted.*

*Held that it was doubtful whether the conviction was competent, and ordered that this case be argued again.*

JAFFER,—Appellant

versus

THE QUEEN—,Respondent

Before

His Honor A. MURN,—Second Puisne Judge

and

His Honor L. COX,—Third Puisne Judge

T. L. JENKINS,—Counsel for Appellant

J. A. HIRIE,—Attorney for the same

J. M. GIBSON, Substitute Procureur General,  
Counsel for Respondent  
J. GUIBERT,—Attorney for the same

Record No. 495

28th February 1883.

This is an appeal from a conviction of the District Magistrate of Port Louis. The charge against the appellant, was according to the information "that he did wilfully and knowingly aid and abet in the means of facilitating a misdemeanour to wit: did aid and abet the author of a larceny of sugar to wit: one David to abstract, steal and carry away with intent to defraud about twenty kilos of sugar." The appellant denied the charge, the Magistrate after hearing the evidence convicted and sentenced him to six months imprisonment.

On reviewing the information and conviction as we are required to do by article 123 of ordinance 35 of 1852, we find that there is apparently a difference between the charge as it results from the above information and that of which the Magistrate convicted. The charge resulting from the information, we think, is that of having aided and abetted the thief in the execution of the larceny and falls under the 3rd part of art. 38 of the Penal Code. But in this conviction the Magistrate states the charge to be one of "having aided and abetted David to steal" by the fact of ordering him the said David to fill up a bag of sugar and to carry the same to a carriage which was waiting at the dock and the Magistrate convicts Jaffer of the offence charged as aforesaid. Now that offence is really one of having by abuse of authority given instructions for the commission of the larceny falling under the first part of article 28 and it is not the one charged in the information in which we are unable to find the words "by the fact of ordering David to fill up a bag of sugar and to carry the same to a carriage which was waiting at the dock" which the Magistrate gives as being part of the complaint.

Under the circumstances it appears to be doubtful whether this conviction is a competent one but as this point was not expressly raised in the grounds of appeal, we think it right to give the parties an opportunity of being heard on it, and appoint this case to be argued again.

## SUPREME COURT

ACTION FOR POSSESSION OF LAND.—DAMAGES  
—PRESCRIPTION.—WRIT OF HABERE FACIAS POSSESSIONEM.

*The plaintiff in this case claimed a portion of land in possession of the defendant, and which he, the plaintiff, purchased at the Bar, on a licitation of the property of the late Louis Raoul.*

*Defendant replied that the land claimed from him did not form part of the Estate of the late Louis Raoul, and that it belonged to him by prescription of 30 years.*

*The plaintiff attempted to prove by a document under private signatures, that the land in question had been sold to the late Louis Raoul by one François Raoul, but to prove the title of François Raoul, the plaintiff founded upon a private act which shewed that the land had been sold by Louis Raoul to one Adelson, from whom defendant held the land.*

*Held that the plaintiff had not established a valid title to the land, and must fail in his action, unless he elects to be non suited, in either case with costs.*

*Plaintiff also moved for a writ of habere facias possessionem which is refused.*

—  
EVARISTE POGNET,—Plaintiff

versus

SUJEEBUNSING,—Defendant

—  
Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor L. COX—Third Puisne Judge

—  
L. ROUILLARD,—Of Counsel for Plaintiff  
P. F. LAFWELLE,—Attorney for the same

H. GALÉA—Of Counsel for Defendant  
A. DESVAUX—Attorney for the same

Records Nos. 21,753 & 21,814

2nd March 1883.

In this action the plaintiff seeks judgment finding and declaring him to be the legal owner of 28 acres of land situate in the district of Pamplemousses, ordering the defendant (who is in possession) to deliver up the land to him, and condemning the defendant in damages for the illegal detention of his land.

The plaintiff purchased the property in question before the Master, on a sale by licitation prosecuted by him against the other heirs of the late Louis Raoul. The defendant is in possession of the land claimed. He avers that he has been so far more than a year and a day, and he pleads that the plaintiff has no valid title and that he is the lawful owner in virtue of thirty years prescriptive possession of the land.

The defendant does not dispute that the proceedings in licitation were carried out between the lawful heirs of the late Louis Raoul, and that the award of the Master has vested the plaintiff with all rights competent to them. But he challenges the title of Louis Raoul.

There can be no doubt that as the plaintiff seeks to eject the defendant from the land of which he is in possession, he must establish his title to the land claimed, and prove that it formed part of the succession of Louis Raoul. He cannot content himself with arguing that the defendant has no written title opposable to his own.

In order to establish the right of Louis Raoul to the land, the plaintiff relies on an extract from the registers of transcription, of an act under private signatures, bearing to set forth a sale by one François Raoul to Louis Raoul. To this the defendant objects, first that such an extract of a private deed is not a valid title and does not even form a "com-mencement de preuve par écrit" (art. 1336 C. C. Larombière Vol. IV art. 1336 § 6) and he further contends that the plaintiff has failed to prove a title to the land in the person of François Raoul. The first objection appears to us to be one of a very serious

nature, but we do not think it necessary to proceed upon it, as the defendant's alternative contention seems to be fatal to the plaintiff's action. In order to establish a title in François Raoul, the plaintiff was forced to rely on a private act dated 25th February 1875, (which he alleged had been produced in the licitation proceeding by the defendant as his title) which bears to set forth a sale by one François Adelson fils to the defendant. On the narrative clause of this deed the plaintiff founds, as showing that François Raoul was formerly owner of the land. We are of opinion however that if the plaintiff goes upon this deed he must take it as a whole, and that he cannot be heard to rely upon it as showing the existence of a title in François, and at the same time to repudiate it as showing the conveyance from Louis (to whom François sold) to Adelson the defendant's author. It may very well be, that if the issue now before us were whether the defendant could prove a valid written title to the land, he must have been held to have failed. But as we have already indicated, the plaintiff in order to succeed in his action must establish a valid title in himself, and this we are clearly of opinion that he has not done. He must accordingly fail in his action, which unless he elect to be non suited, must be dismissed; and in either case with costs in favor of the defendant.

Connected with this action there is also before us an application by the plaintiff for a writ of *habere facias possessionem*, ejecting the defendant from this land, which has been referred to the Court by the Judge in Chambers. This application must follow the fate of the main action and be refused with costs.

### SUPREME COURT

APPEAL FROM DECISION OF DISTRICT JUDGE SEYCHELLES.—POSSESSORY ACTION—TITLE BASED UPON "BONA FIDE" POSSESSION OF MORE THAN 10 YEARS—WHAT IS A "JUSTE TITRE."—ARTICLE 2265 CIVIL CODE.

*The appellant and respondent are resident in Seychelles.*

*In 1861 the appellant purchased from a Mrs Houareau 23 acres of a larger portion of land said to contain 42 acres. Six months after the sale, the remainder of the land was purchased by the respondent.*

*In both deeds of sale it was agreed, that the expense of setting out the boundary line between the aforementioned purchasers, should be borne by the purchasers themselves.*

*They took possession of what they believed to be their respective shares of the 42 acres, and remained in peaceable possession for 20 years, cultivating the land and respecting the boundaries each other.*

*In 1881 the appellant caused the land to be surveyed, when it was discovered that the total quantity in possession of both appellant and respondent, only amounted to 23 acres instead of 42.*

*The respondent objected to the survey, and declined to give up possession of the land he occupied.*

*The appellant sued for the recovery of the land he claims before the District Judge of Seychelles, who decided that the respondent held in virtue of a "juste titre" and had been in occupation for more than 10 years.*

*From this decision the appellant appeals.*

*Appeal dismissed with costs.*

ALBERT,—Appellant

versus

MONDON,—Respondent

Before

His Honor A. MURE,—Second Puisne Judge

and

His Honor L. Cox,—Third Puisne Judge

R. M. BROWN,—Of Counsel for Appellant  
F. MALLET,—Attorney for the same

V. DELAFAYE,—Of Counsel for Respondent  
G. KERNIG,—Attorney for the same

Record No. 770

## JUDGMENT OF HIS HONOR A. MURE

6th March 1883

This is an appeal from a judgment of the Judge of the District Court of Seychelles in which rather an important point was raised, but on which after considering the matter, I have no doubt what the judgment of the Court should be.

It appears that a Madame Houareau had a piece of land which she believed to contain 42 acres, and she sold out of that amount, as she supposed, on the 1st of July 1861, a portion of that land to a Mr Japhet Albert, which she describes to be taken from the half of 84 acres, known as the terrain J. M.; the said land to the extent of 22 acres being bounded, according to the "procès-verbal" of Mr Butler the Government surveyor, dated the 1st of March 1858, on the east by a line inclined towards the north  $12^{\circ}$  west, on the north by a balisage common with the concession J. L., on the west by a balisage still with the same land J. L., and on the south by the remainder of the same land still belonging to the seller. As a condition of this contract of sale, it is said that the buyer by agreement was to pay conjointly with the purchaser of the remainder of this land, the boundary line to be traced by any surveyor who shall be employed to survey it. Six months afterwards, the same lady sold the remainder of the land to the respondent Mondon. In this deed the remainder of the land is thus described. It is called the remainder of the land for a house, under the letters J. M., this remainder of the extent of 20 acres bounded: on the north by a balisage common with the land J. L., on the east by a line upon the reserves inclined to the north  $12^{\circ}$  west, on the west by the said land J. L., and on the south by a portion of the same land sold to Albert. Both these deeds contain somewhat the same condition about the survey of the land, which essentially comes to this; that the seller is not to be troubled with paying any of the expenses of the subsequent survey which was to determine the line of boundary between the two respective properties thus sold.

I do not think it has any other effect. There is another remark I think it right to make, and that is, that the boundaries themselves of the two subjects are nearly the same. Now there seems to have been a mistake made by Albert, when he took possession of the land;

he took possession of the wrong side of the land, for his subject is said to be bounded on the south by the rest of the land belonging to the seller, but he places himself in such a position, that it is impossible that that boundary could have been true. Either one of two things appears to be the fact, that either there is a mistake in the boundaries, or that he took possession of a piece of land which is the opposite of what he should have done, but this really to my mind is a matter of no consequence, because there was a possession of 20 years following upon this title, and it is perfectly clear that the possession of the parties, is that which will explain most certainly and most clearly, what the rights conferred by the respective deeds were.

These being the titles which the parties had, they seem to have entered into possession about the time that each of them had this act of sale conferred on him. They apparently in a friendly manner, divided the land between them, and continued throughout a period of more than 20 years to occupy the land, believing that they had divided it approximately to their rights. It turns out after 20 years possession, that the whole portion of land in the first place is not nearly of the extent which was supposed: in place of 42 acres, there are only 28 acres, and of course the two holders of these acts of sale have been deceived in the rights which they have acquired, that is the source of the subsequent mistakes which take place. Neither of them knew this nor had the least idea of it; they both supposed, there were 42 acres of land and as one had 22 acres, and the other 20 acres, they imagined that by dividing the land equally, so far as their eye could tell them, that they had done what was just and right as between each other; and they remained on perfect friendly terms for 20 years, not taking any steps to have their rights legally and properly determined. But there came a time when Mr Albert desired to have his property surveyed, and the actual amount given to him which he thought he was entitled to. He accordingly called in a Government surveyor, and that gentleman when he came to consider the land in the first place, discovered that there were not 42 acres but 28 acres in all, and on Mr Albert calling on Mr Mondon to give him his 22 acres he made out a line of boundary which, if it had been concluded on these terms, would have left to Mr Mondon only the quantity of six acres of land. Mr Mondon in the course of this survey objected, he refused to sign the "procès-verbal" and he refused

to assent to this proposed division, and thereupon this division, which had been amicable to begin with, was begun again, the parties proceeding judicially. Mr Albert summoned Mr Mondon to attend to this division of boundaries and Mr Mondon refused to attend to it, and then proceedings were raised in the District Court of Seychelles, an action was raised by Mr Albert in which he founded in the first place on his title—the title which I have narrated above—and founding also on the defendant's opposition to the continuation of the survey—he concluded his plaint with four substantive demands: (1st) that the Court should set aside the opposition of the defendant to the survey, and that that opposition should be held to be null and void. (2nd) that the survey should proceed to its end. (3rd) that all the land within the surveyor's line should be declared by the Court to belong to the plaintiff, and there was a fourth conclusion for Rs 200 damages and with costs.

Now the defence to that action was this, that there was a just title on the part of the defendant, that he had prescribed by virtue of that just title the land that he had cultivated during more than 10 years, and that therefore the plaintiff could not succeed in his action. The parties produced their titles to the Judge and the question raised, not only here but in the Court below, was whether the title of the defendant Mondon was a just title which would found prescription, and that is the question which the Court has now to determine. Upon that question I confess I think there can be no doubt, this person *bona fide* received for an onerous consideration a title which described his land as a remainder which was of the extent of 20 acres. The words are: "Ce reste de la concession de vingt arpents." It is perfectly plain that this party received this title in *bona fides*, and in the next place, he received it from the party who was the real owner of the land. What then is a just title? It is a title which is sufficient to transfer the property from the real owner, or from a person believed to be the real owner, to the transferee; or from the donor to the donee, or from the assignor to the assignee, or upon any of those grounds in law which are sufficient to transfer property. A just title is not, as has been supposed, the mere act of sale or other deed, in each case, it is not that to which article 2265 of the Code refers, that which gives the possession is not the mere bit of paper, upon which the thing is written, but it is the right which gives the cause of pos-

session and which cause of possession springs from the true owner of the property. To be just, it must be of such a nature that the right of property shall be transferred from the assignor to the assignee, or from the donor to the donee; and Troplong in defining just title as that which by its nature transfers property uses these words: "En un mot, dans cette matière, le juste titre est le titre non précaire et translatif, c'est celui qui aurait transféré le domaine de la chose si le cédant eut été vrai propriétaire." So interpreting the law, I have no hesitation in coming to the conclusion, that this deed, which was received by Mondon, did form a just title. He possessed the land within the limits of his rights, and not beyond the limits of his rights, and with a sufficient certainty, I think, to enable him to possess and to cultivate it *animo domini*.

That being the view I take of this title, the only other question is, whether there was sufficient possession to entitle him to say that he has prescribed the Land which he did take possession of; and upon this subject there is a very considerable body of evidence, no doubt there is some evidence to the effect that the plantations seemed intermixed at the upper portion; and that it had been planted, as it were, intermingled, but the great body of the evidence is to the effect that this Land was divided between the parties amicably, that they respected each others plantations, that the line was known between them, and that it was well marked; Japhet Albert himself states this fact in his own evidence, and as he is the appellant here, and as he is objecting to this decree, there can be no better view of the matter than that which he has given. He says, "We planted in the Land and we respected each other plantations." I took possession of about half after I bought, Mondon took possession of about the half of 42 acres, so we became neighbours having properties that touched each other, we planted our land mutually, and we continued to do so up to this day." That being the statement which Albert himself makes as to the mode in which he possessed the land, and that being confirmed by the great body of Mondon's witnesses, I have no hesitation in coming to the conclusion, that the possession has been such as to give the latter an undoubted right to object to the conclusion of the plaint. Let us remember that this is not an action to determine the properties of the parties, or to determine the absolute rights of the parties, but it is merely an action of boundaries and certainly the

title of Mondon to the twenty acres and his possession of 18 acres, following upon that title, seems to me to be a complete answer to such a case: I think the appeal must be dismissed with costs.

JUDGMENT OF HIS HONOR L. J. OX.

6th March 1883

I am of the same opinion. The effect of this action, if it is entertained, will be to take away from the defendant, now the respondent, 14 acres of land which he claims to have possessed for upwards of 20 years. The Magistrate has found that there was prescription, and the main question before us is whether he was right in his conclusion. We have first to see whether the title set up by Mondon is a "juste titre" within the meaning of article 2265. It purports to be a notarial deed of sale made by Mrs Houareau to him in 1861. Now the deposition of a just title, according to the authorities, is such a conveyance as will pass property, if the assignor is the owner of the subject assigned. There is no doubt that such a document as is put forward here, would have transferred the ownership of the remainder of the land, if the ownership were really vested in the vendor, but it is contended, for the appellant, that the vendor did not really sell the land which is now occupied or which the respondent now claims to occupy, but that she merely sold to him a portion of 6 acres of land, because she sold to him only what remained after the previous sale made to the appellant. Now if we have to decide here whether the title of the respondent is a sufficient title by itself, making him the owner of the land, I should have no hesitation in saying that the appellant was right in his contention, because it is clear that before the sale to the respondent, Mrs Hoareau had sold already 22 acres of the land, and in fact there remained only about six acres and that she could only sell to the respondent what belonged to her, and that therefore legally she could only make him the owner of about 6 acres. But we have not to say here whether the title which the respondent sets up is *per se* a sufficient answer to the action; what we have to say is whether the person who sold to him, intended to sell to him, and whether he intended to buy all the land that he claims. Upon that I think there can be no doubt; first of all the

extent of the land is said to be 20 acres, which is said to be the "reste du terrain"; if those words "reste du terrain" stood alone, the argument of Mr Brown would be correct, but the words are "ce reste de la contenance de 20 arpents." Now on turning to the 1st deed of sale by Mrs Hoareau to appellant, we find that the total extent of the land is said to be 42 acres, of which she sells 22 acres to the appellant, and in the sale to the respondent she tells him "I sell to you the rest of 20 acres." The effect of both those deeds taken together is very clearly to shew, that what the vendor intended to pass to the respondent was 20 acres of land. But it turns out that the whole land is under 20 acres, because even counting the 14 acres in dispute, he would not have his quantity of 20 acres. I think therefore, that this first question must be decided against the appellant.

There remains only the question of possession. Upon that the Magistrate has decided in favor of the respondent, and I think the weight of the evidence is clearly in support of his decision. There is no doubt the respondent is in possession. It is argued however that the possession cannot be said to be *animo domini* because there was an agreement between the parties, that as soon as they could afford it, a regular survey would take place, and each would have his boundary settled. If there were a positive agreement between the parties that on a survey being made, each of them would give up to his neighbour the land found to be on his neighbour's side, perhaps such an agreement, being distinctly proved, it might be said that possession upon such a condition as that would not be a possession *animo domini*, but I can find no sufficient proof that there was such an agreement consented to by both parties. Perhaps something more than parol evidence of such a contract would be required, but assuming that it may be proved on parol proof, I do not think that the parol evidence supports the defendant's contention to that length. I think it clear that the respondent would be very glad to have a survey made to and to have a regular line drawn up, but I think it is also plain that he never intended to give any land of which he is now in possession, that might be taken away from him by the effect of such a survey. He denies having consented to any such thing, and I find his conduct is scarcely consistent with his having given such a consent. For instance, several years before the survey made by Mr Butler, a mutual friend was called in, to find out where the line was. Mondon con-



sented to that, and one gentleman actually began doing the needful, but as soon as it was found out that the line would encroach on the land which the respondent now occupies, he at once objected to it. His attitude was exactly the same when Mr. Butler completed his survey, and I think, therefore, it is impossible to say that there was an attempt on his part to give consent to the survey—Therefore I think there was possession *animo domini*, as a fact the occupation and possession are perfectly clear, and I think upon the two points of law and of fact, the magistrate's judgment was a correct one, and that the plea was a sufficient answer to the claim.

### SUPREME COURT

APPEAL—DISMISSAL OF INTERPLEADER SUMMONS.—EN FAIT DE MEUBLES LA POSSESSION VAUT TITRE.

*One Arlapin holding a judgment against Charyapa and wife, caused an usher on the 8th November 1882, to seize certain household furniture in the possession of appellant, and on her premises. On the 17th November she lodged a claim in the hands of the usher, alleging that the furniture seized belonged to her.*

*The Magistrate dismissed the interpleader summons, on the ground that the creditor ought to be correctly informed of the grounds on which the claimant rests his action, and that the allegation made in the claim are not sufficiently specific.*

*Held that possession of moveables is a presumption of property, which subsists so long as it is not destroyed by contrary proof.*

*Judgment of Magistrate recalled with costs. Case remitted to Magistrate to be proceeded with in terms of law.*

WIDOW DOMINIQUE,—Appellant

versus

ARLAPIN & ANOTHER,—Respondents

Before

His Honor Sir A.G. ELLIS, Kt. —Chief Judge

and

His Honor A. MURK—Second Puisne Judge

L. A. THIBAUD,—Counsel for Appellant  
L. WOHRNITZ,—Attorney for the same

V. K/vern,—Counsel for Respondents  
E. GANACHAUD,—Attorney for the same

Record No. 779

22nd March 1883

This is an appeal against a judgment of the Senior District Magistrate of Port Louis, by which he has dismissed an interpleader summons obtained by widow Dominique, the appellant, who claimed certain articles of household furniture seized by the respondent Arlapin as execution creditor.

It seems that Arlapin holding a judgment against Charyapa and wife, caused an usher on 8th November 1882, to seize certain goods which are all articles of household furniture. Thereafter, on 17th November, following the appellant lodged a claim in the usher's hands, in which after detailing all the articles seized individually it is alleged that "they are the property of widow Dominique, and do not belong to the said Charyapa and wife," that "she claims the said articles having been in possession thereof when the seizure was made and that the said seizure was made in her premises." The Magistrate has dismissed the interpleader summons following on this claim, on the ground that the creditor ought to be correctly informed of the grounds on which the claimant rests his action, and that the allegations made in the claim are not sufficiently specific.

There is no doubt that the party who claims as his, goods which have been seized, is bound to state the grounds of his claim. The precision and detail of these grounds may vary with the circumstances of each case. The question here, is whether the grounds of the appellant's claim are sufficiently precise.

It will be observed that the whole goods are articles of household furniture, and that they are stated not to belong to the debtors, but to the claimant, that at the time they were seized they were situated in her own premises, and further that they were in her possession. If moveables are in the house of a person, and are consequently in his possession, and that is averred, it is difficult to see what more specific information could be given to the opposing creditor. Goods may be seized after many years' possession; when it would be impossible to tell how or when they came into the parties' possession. At all events, the rule of our law is "en fait de meubles la possession vaut titre." The rule does not mean that the possession of a moveable has a presumption *juris et de jure* in his favor that he is the real proprietor, and which excludes all other proof, but that there is a presumption of property, which subsists so long as it is not destroyed by contrary proof. If it be proved that the alleged possessor is not in good faith, or that the possession is simulate or that the goods really belong to the debtor, the presumption will be overcome. Holding in the present case that enough has been alleged to raise the contestation of parties, we recall the judgment complained of and remit to the Magistrate to proceed with the case in terms of law, and we find the appellant entitled to the costs of this appeal.

# SUPREME COURT

APPEAL TO PRIVY COUNCIL.—AMOUNT OF JUDGMENT, NOT AMOUNT OF SUIT, TO BE TAKEN AS AMOUNT AT ISSUE.—Rs. 10,000 ARE NOT £ 1,000 FOR PURPOSES OF APPEAL.—APPEAL DECLINED.

*By a judgment delivered on 22nd December last, the plaintiff recovered against the defendants jointly and severally, the sum of Rs. 11,926.84 with costs of suit.*

*From this judgment the defendants move to appeal to Her Majesty in her Privy Council. The motion is resisted by the plaintiff on the ground that the matter at issue is not above the amount of £ 1,000.*

*In answer to this objection it was contended for the defendants that the judgment was one pronounced in respect of matter at*

*issue above the amount in value of £ 1,000, because the plaintiff in his declaration had claimed Rs. 21,192.62.*

*Held that the prejudice caused to the defendants is the amount of the judgment, i. e. Rs. 11,926 and no more, excluding the costs, and that the question to be decided, taking into consideration exchange etc., was whether Rs. 11,926 represented a greater value than £ 1,000.*

*The defendants urged that the sum of £ 1,000 must be held to be exceeded by Rs. 11,926 as by the currency laws of the Colony Rs. 10 are equivalent to £ 1. This was overruled by the Court, which held that the question at issue was one of fact to be decided by proof.*

*Proof was adduced from which it resulted that Rs. 11,926 were not equal in value to £ 1,000. The motion for leave of appeal was dismissed with costs.*

RAYNAUD,—Appellant

versus

ROHAN & ors.,—Respondents

Before

His Honor Sir A. G. ELLIS Kt.—Chief Judge

and

His Honor A. MURE—Second Puisne Judge

W. NEWTON.—Of Counsel for Appellant  
A. LHOSTE,—Attorney for the same

L. ROUILLARD,—Counsel for Respondents  
A. ROHAN,—Attorney for the same

Record No. 21,621

22nd March 1883.

This is a motion by the defendants in the above cause to appeal to Her Majesty in Her Privy Council against a judgment delivered by this Court on 22nd December last, by which the plaintiff recovered against each

of them jointly and severally the sum of Rs 11,926.84 c. with costs of suit. The motion is resisted by the plaintiff on the ground that the matter at issue is not above the amount in value of £ 1000 as required by the Royal Order of 1831.

In answer to this objection it was contended for the defendants that the judgment was one pronounced "in respect of matter at issue" above the amount in value of £ 1000 "because the plaintiff in his declaration had claimed Rs 21,192.62 (a sum which admittedly is above the value of £ 1000). In other words it was urged that the value of the matter at issue in respect of which the judgment is pronounced, must be determined by reference to the sum claimed by the plaintiff. If the plaintiff's action had been dismissed and he sought to appeal against the judgment dismissing it, it might have been contended that the test suggested was the correct one,—but the appeal here is arrested by the defendants, who seek to be delivered from a judgment by which they were ordered to pay a sum inferior to that which the plaintiff had claimed. The prejudice caused to them is clearly of the amount of the judgment (Rs 11,926) and no more, (the costs not being taken into account, as it was admitted for the defendants, they could not be added to the principal sum recovered in estimating the appealable value, *Railway Company of Canada v. Baird* 1 M. P. C. N. S. 114); now, in *McFarlane v. Leclaire* 15 M. P. C. 187, it was laid down that in determining the question of the value of the matter in dispute, the correct course to adopt is to look at the judgment as it affects the interest of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal. We must apply that principle and hold that in this instance it is the amount decreed for, and not the sum claimed in the declaration, which must be taken as the matter at issue.

We have accordingly to enquire whether as contended subsidiarily by the defendants, the sum recovered by the plaintiff is above the "amount or value of £ 1000", the words "amount of £ 1000" refer, we think, to a matter at issue expressed in pounds sterling, and therefore the question properly is, whether the sum of Rs 11,926.84 recovered by the plaintiff, is above the value of £ 1000.

The defendants contend that it must be decreed to be above that value, because they urged, by the effect of the currency law, of

this colony, Rs 10 are equivalent to £ 1. In support of this contention, the defendants rely upon a "Proclamation for the regulation of the currency of Mauritius" approved by the Royal Order in Council of 12th August 1876 and especially on section 9 which is as follows: "And we do hereby further ordain and declare that whenever the determination of the British currency shall have been specified in any regulation and ordinance, proclamation, minute, notification or contract in force at the date of bringing into operation of this proclamation, whether as payment to be made to or by the Government of Mauritius or by any other persons, such sums shall continue as heretofore to be received and paid at the rate in force at the aforesaid date." Assuming that the Royal Order of 1831 may be considered regulation, proclamation &c., within the section relied upon it is clearly not a regulation &c. in which the "denomination of British currency is used as to payments to be made &c."

The object of the section is clearly to regulate the mode in which sums expressed in British currency in the clause of regulations &c. provided (i. e. in force at a certain date: 1st January 1877) are to be paid, and there is nothing in it to shew that the framers of the proclamation intended at the same time to modify the Royal Order which prescribed the conditions under which appeals to Her Majesty are competent. We cannot therefore rule that the Royal Order is governed by that section, and that the word "£ 1000" in the Royal Order must be read as Rs 10000, nor can we find in the other parts of the proclamation, any thing to indicate that it was intended, as the defendants contend, to give to the Rupee a fixed value of two shillings, so that Rs 10 in Mauritius should always be deemed equal to £ 1, accordingly it appears to us, that the defendants' proposition that by the operation of the currency law of the Colony the sum of Rs 11,926 recovered by the plaintiff is equivalent to £ 1,196, is altogether untenable.

The question whether that sum is or is not above the value of £ 1000, is not in my opinion a question of law, but one of fact, to be decided upon evidence. Evidence has been laid before us, and we have now to examine whether upon it we can say that the number of Rupees, which the defendants have been ordered to pay, is above the value of £ 1000.

Before going into the proof, we must say

that we do not believe in the possibility of finding out the par of exchange which has been frequently referred to in the argument, or the precise intrinsic value of the Rupee in terms of British currency; and the reason is plain: one of the currencies having a silver and the other a gold standard, it is not possible to say how many of the silver coins are exactly equal in value to one of the gold coins. The utmost we can do must therefore be, to find out what in the evidence is at a given date, the nearest equivalent in Rupees of a pound sterling.

The evidence supplies us with two tests for that purpose. First we have proof of the exact quantity of Rupees that a man must pay here in order to procure a sovereign, the evidence on that point is not favourable to the defendants.

It is shown by an affidavit of Mr W. Rogers, that never since June 1882 (when the action was entered) has it been possible to buy in the market, one pound sterling for less than 22½ o/o premium. This is the usual way here of expressing that £ 1 is worth Rs 12.22½, the Rupee is given the nominal value of 2s. or Rs 10 the value of £ 1, and the difference between Rs 10 and the sum actually necessary to buy a sovereign, is called the premium. The result of this evidence, which has not been contradicted, is that £ 1 being worth Rs 12.25 the appealable amount £ 1000 would be equivalent to Rs 12,250. In other words the amount of the judgment (Rs 11996) would be under the value of £ 1000.

The next test suggested by the evidence is the rate of exchange on London, that is the quantity of rupees that a man must pay, to obtain such a document as will enable him to procure one pound on London.

The defendants have given evidence of the rates of exchange for Bills at 90 days sight, but we do not think they afford the proper test. For a bill for £ 1 at 3 months' sight is not now worth £ 1, it will be worth that amount, only after three months from acceptance, and therefore the number of rupees paid for such an instrument, does not represent the present value of £ 1. We must therefore prefer to follow the rates for bills at sight, even they may be open to the objection that to persons taking them, they represent the value expressed, less about one month's interest, the time necessary for transmission of the instrument to London, but that is a

circumstance of which the defendants cannot of course complain.

The evidence shows that the current rates for bills at sight were 10. in June 1882, when the action was entered, 22, 68 premium; 20. in december when the judgment was given 22.29. 80. In January last 22.29; and 40. when the evidence was laid before us, 22.68 o/o premium. Even taking the lower rate of 22.29 that charged when the judgment was given, the result is that to obtain a bill for £ 1 at that time, one must have paid Rs. 10 plus 22.29 o/o = 12.229, which would give us for a bill for £ 1,000, the appealable amount Rs. 12,229, a sum exceeding the matter at issue, which is Rs. 11,926.

But it was contended for the defendants that the current rates published by the Banks, really include a percentage to cover the Bank's expenses of transmission, their profits &c., which should be deducted in order to arrive at the real value in Mauritius. — This contention appeared to us to deserve consideration, and we allowed the defendants to lead further evidence, to show the percentage which they alleged should be so deducted. The evidence has been placed before us, and we find that in practice Drafts are originally issued by the merchants of the Colony. Those Drafts are bought up by the Banks, who afterwards issue their own paper to the public at rates higher than they have themselves paid. It is clear that it is in the rates charged by the merchants, when they sell their Drafts to the Banks, that we must look for the real value of the sterling. Now the defendants' witnesses have told us, what is the difference between the rate at which the Banks purchase, and the rate at which they resell. Mr. Kidson tell us it varies from 2 to 3 o/o, while Mr. Hourquebie and Mr. Couve state it to be from 1½ to 2 o/o.

This evidence does not advance the defendants' case. For even if we were to take Mr. Kidson's highest valuation, and deduct 3 o/o from the lowest published rate of exchange, that is, deduct 3 o/o from 22.29 we would have as the selling rate of the merchants 19.29 o/o premium, in other words £ 1 would be worth Rs. 11.929, and for the appealable amount of £ 1,000, we would find a value of Rs. 11929 a sum in excess of the matter at issue, Rs. 11926, by a few rupees. If we take Mr. Kidson lower valuation of 2 o/o, which is the same as the highest of Messrs. Hourquebie and Couve, we find the merchants' rates of exchange to be 20.29

o/o, and thus we find that the appealable amount is equivalent to Rs. 12,029 or more than the matter at issue. Finally if we take the lowest rate given by Hourquebie and Couve, we find the merchant's rate to be 20.79 o/o, which makes the appealable amount equivalent to Rs. 12,079 a sum again in excess of the matter at issue.

We must therefore hold that the matter at issue in this judgment, is under the value of £ 1,000, and accordingly, that we have not the power of granting to the defendants leave to appeal.

We have not been able to find an express decision of the Privy Council in support of this decision, but we quote *Boswell vs. Kilborne* 12 M. P. C. 468—in which the Court of Canada refused leave to appeal against a judgment for £ 600 of Local Currency, the statute requiring as the appealable amount, £ 500 sterling.

On a petition to the Judicial Committee, leave to appeal was granted on special grounds, but the course followed by the Court below was not criticised. The defendants' motion must be dismissed with costs.

### SUPREME COURT.

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE OF PORT-LOUIS.—CONVICTION QUASHED AS IT PROCEEDS UPON AN OFFENCE NOT CHARGED.—ART. 38 PARAGRAPH 3 OF THE PENAL CODE.

*The Appellant was employed in a Mercantile House and was directed to mix some 240 bags of sugar so as to produce a certain shade of colour.*

*He directed one David to procure two small bags and to fill one of them, and there is evidence that David carried that sugar to a carriage under the instructions of the appellant.*

*The Information charged simply aiding and abetting, and was filed under the third paragraph of article 38 of the Penal Code.*

*The conviction drawn up by the Magistrate sets out that the Appellant aided and abetted in the larceny, but the following words*

*are added "by the fact of ordering him "the said David to fill up a small bag of "sugar and to carry the same to a carriage "which was waiting at the Dock"—words which would appear to bring the case under the first para of the article above mentioned.*

*Held that it was impossible to say to which paragraph the Magistrate intended his conviction to apply.*

*That in adding the words mentioned to the narrative of the charge, and proceeding to convict upon what he considered the charge, the Magistrate has convicted the Appellant of a thing of which he was not charged.*

*Conviction set aside.*

JAFFER,—Appellant,

versus

THE QUEEN,—Respondent.

Before

His Honor A. MURE.—Second Puisne Judge

and

His Honor L. Cox,—Third Puisne Judge.

T. L. JENKINS.—Counsel for appellant.

J. A. HITIÉ.—Attorney for the same.

J. M. GIBSON, Substitute Procureur General,  
—Counsel for respondent

J. GUIBERT,—Attorney for the same.

Record No. 495.

JUDGMENT OF HIS HONOR A. MURE

30th March 1883.

In this case there was a conviction in the lower Court under which Jaffer, the appellant, was sentenced to six months imprisonment, from which he has appealed. It appears that he was charged in the Court below with the following offence. "That on the 12th day of "October in the year of our Lord 1883 at "Albion Dock in the said District, one Jaffer

“ of no known residence, lately of the *Albion Dock*, did wilfully, unlawfully and knowingly aid and abet in the means of facilitating a misdemeanor to wit: did on the date and at the place aforesaid aid and abet the author of a larceny of sugar, to wit: one David to abstract, steal, take and carry away with intent to defraud, about 20 kilos of sugar, not belonging to him the said David”. This information is certainly not grammatically expressed, but of course the Court will not proceed upon that fact. The crime that seems to be revealed here is the crime of aiding and abetting in a larceny by helping David to abstract, take steal and carry away, with intent to defraud 20 kilos, of sugar. The 3rd section of the 38th article of the Penal Code is to the following effect. “ Those who shall have knowingly aided and abetted the author or authors of any crime or misdemeanor in the means of preparing, facilitating or perpetrating such crime or misdemeanor, shall likewise be deemed accomplices.”

It is clear that from the words used in the information it intended to state an offence against the said 3rd paragraph of the 38th Article of the Penal Code.

The Magistrate in the Court below heard the evidence at great length, from which it appeared that Jaffer, was a man in a superior position, a clerk I believe to Pipon, Adam & Co., and that he was directed to mingle some 240 bags of sugar so as to produce a certain shade of color, and that he directed David to procure two small bags and to fill one of them, and there is evidence that David carried that sugar to a carriage under the instructions of this man Jaffer.

That, I think, is the general nature of the evidence and the gist of it. We next come to the conviction which the magistrate drew up. He inserts in the first place, the information and he says in “the terms of the information”, “ Jaffer did wilfully, unlawfully and knowingly aid and abet in the means of facilitating a misdemeanor, to wit: did on the date and at the place aforesaid, aid and abet the author of a larceny of sugar to wit: one David to abstract, steal, take and carry away with intent to defraud about 20 kilos of sugar, not belonging to him, the said David”, and then he adds these words to the conviction “ by the fact of ordering him the said David to fill up a small bag of sugar, and to carry the same to a Carriage which was waiting at the Dock. Whereupon the

“ said Jaffer after having been duly called upon to answer the said charge ” thus shewing that he intended to insert the charge as it appeared in the information. But he has added a very material averment to the charge in the information. He has added the averment that David was ordered by Jaffer to fill up a bag of sugar, and carry the same to a carriage which was waiting at the Dock, the question arises, is this a good conviction? the Magistrate having added to averments in the information and having convicted upon this 38th Section, proceeding not upon the 3rd paragraph but upon the first paragraph of it, for the first paragraph is “ Those persons shall be punished as accomplices in a crime or misdemeanor, who by gifts, promises, menaces, abuse of authority or power, machinations or culpable artifices shall have instigated to, or have given any instructions for the commission of such crime or misdemeanor.” The matter stands thus: The Magistrate has chosen to add in his conviction, to the information important words which undoubtedly seem to bring this offence under the first paragraph, that is to say, that by abuse of his authority he gave instructions for the commissions of this crime, and it is said in answer to this objection, that in truth and in reality the Magistrate meant to convict upon the third paragraph of this Ordinance, and that what he added by the words “ ordering to be put into the carriage ” was simply a means of aiding and abetting in the accomplishment of the offence. My remark upon this point is, that at least this conviction is ambiguous: it is impossible to say to which of these two paragraphs the Magistrate meant his conviction to apply, and I think there ought to be no doubt about that. He seems with his own hand to make a very important addition to this information, which was not very well expressed, and in doing so he brought this conviction within the purview of the evidence, which had been laid before him. This I think was going beyond what the magistrate was entitled to do, he was bound to find whether there had been a crime within the terms of the third paragraph of the 38th Article, or not; but in place of that, he puts in words which create an ambiguity and a doubt, and I think that any thing which is ambiguous or doubtful in criminal matters, is not a judgment that can stand.

This being the view I entertain of this matter, I am of opinion that judgment must be quashed; on the ground, in the first place, that the magistrate has chosen to add mate-

terially to this offence by adding important words to it, that he has created an ambiguity in the information and the conviction, making it doubtful what the crime was.

JUDGMENT OF HIS HONOR L. COX

30th March 1883

I am of the same opinion. The magistrate has added in his narrative of the charge in the information, the words which are to be found in the conviction. The mistake has been probably caused by the fact that there was evidence before him, tending to show that some offence had been committed by the defendant Jaffer, in giving such an order as was mentioned by the Magistrate. It is quite clear that the original information did not mention any such order having been given, and the Magistrate therefore in adding those words in the narrative of the charge, and proceeding to convict upon what he considered as the charge, has I think convicted the appellant of a thing with which he has not been charged, and the result, therefore, is not only that the conviction here is ambiguous, but it is also, I think, open to another serious objection, that this appellant has been convicted of having given instructions or orders for the commission of an offence, and that that is an offence with which he has never been charged, as to which he has not pleaded, as to which the enquiry has not been directed, and as to which, therefore, it may be said he has not been tried; because the charge which was made against him, and upon which the witnesses were examined and cross examined, was a different one; it was that of having actually aided and abetted in the execution of a crime, and that being so I think the decision arrived at was an incompetent one and that the conviction must be set aside.

SUPREME COURT

CLAIM OF INTEREST ON AMOUNT OF VALUATION OF LAND TAKEN UNDER ORDINANCE 1 OF 1881 FROM DATE OF PROCLAMATION TO DATE OF PAYMENT.

*The plaintiff in this case claims interest upon the valuation which the Forests Lands Pur-*

*chase Commission placed upon a portion of her land taken under Ordinance 10 of 1881, from the date of Proclamation.*

*A portion of the total quantity of land proclaimed was under cultivation, the remainder consisted of bare land, the applicant restricted her application to interest on the value of the uncultivated portion. On behalf of the appellant it was urged that by the effect of the proclamation, the appellant had been deprived of the use and disposal of her land, that she will continue to be so deprived until the final decision of the Governor as to the acquisition of the land, and that under such circumstances she is entitled to compensation under paragraph 4 of article 34 of ordinance 10 of 1881.*

*Held 1. The owner is not entitled to compensation simply because his land is proclaimed, but only when he can prove damage which is the natural and immediate consequence of the prohibition or of the delay referred to in article 3.*

*2o. The compensation to which he is then entitled must be equal to the loss proved to have been really suffered.*

*3o. That no interest at 7 o/o or any other rate could be allowed simply because the land had been proclaimed.*

*Appellant's claim to interest cannot be entertained.*

WIDOW DIORÉ—Appellant

versus

GOVERNMENT—Respondent

Before

HIS HONOR A. MURE,—Second Puisne Judge

and

HIS HONOR L. COX—Third Puisne Judge

W. NEWTON,—Of Counsel for Appellants  
V. BOULÉ,—Attorney for the same

M. GIBSON, Substitute Procureur General,  
— Counsel for Respondent  
G. UBERT, — Attorney for the same :

Record No. 21,851

JUDGMENT OF HIS HONOR L. COX

3rd April 1888.

This is an appeal from a valuation by the forests Lands purchase Commission under Ord. 10 1881. The principal question involved has been already decided against the Appellant by Judgment of 14 February last, by which the Court approved the valuation of Rs 159,117 which the Commission has set on the property. But the judgment reserved for further consideration, the appellant's contention that she should be allowed interest on the said sum of Rs 159,117, from 10th May 1881 when her land was "Proclaimed under the provisions of Ord. 1 of 1881. This question has been argued before us, and we now proceed to give our judgment on it.

Before the Commission, the appellant had apparently claimed interest on the value of the whole of the Land which the Government intends to take from her; i. e. on the total sum of Rs 159,117 awarded by the Commission—the claim now submitted to us is however of a more restricted character: the appellant's property taken by the Government, consists of 945 acres, of which 484 acres are under cultivation, the greater part being leased to the owners of "Hermitage" Estate, the remaining portion of 510 acres is not and has never been cultivated—the Commissioners in their report describe it as being "more or less covered with wood or brush-wood." It is now admitted by the appellant that she cannot claim interest on the value of the cultivated portion, and her claim is confined to interest on the value of the uncultivated portion. The appellant does not allege that she has suffered special damage to a determined amount, we were not referred to any fact of the evidence in the record as shewing such damage or the amount of it. But the appellant's Counsel asked us to assent to the following propositions, on which he stated his case.

10. That the land had in fact been proclaimed.

20. By the effect of the prohibition result-

ing from the Proclamation, the appellant has been deprived of the use and disposal of her land. 30. That she will continue to be so deprived until the Governor's final decision as to the acquisition of the land, and 40. that under such circumstances the appellant is in law entitled to compensation under par. 4 of art. 34 of ord. 10 of 1881, and that for such compensation she should be allowed interest, or an annual percentage, on the value of the Land.

In support of the last proposition, the recent decision of this court in *Racet vs Government* was relied upon. We think it clear in the first place that under the general law of the Colony, the appellant is not entitled to interest on the sum representing the value of her property, or on any part of that sum. For the Government is not in the position of a debtor "*in mora*" as provided by article 1153 C. C. or of a purchaser having taken possession and deriving a benefit from the subject purchased, within article 1652 C. C.

The special ordinance itself nowhere contemplates, that the owner of land proclaimed will be entitled to interest from the date of the proclamation, the only article which speaks of interest is art. 19, which provides that the price will bear interest at the rate of 70/0 for a period not exceeding three months from the date of the transcription &c. From this provision it may be inferred "*a contrario*" that the Legislature did not intend that interest would run *before* that date, and for an undetermined period of time.

The appellant's Counsel contends however, that altho' strictly speaking she may not be entitled to interest properly so called, yet she is entitled to *compensation* under art. 30, and that the compensation may be allowed in the shape of interest at an annual percentage on the value of the land, and it was suggested, that as 70/0 is the rate provided by the ordinance in art. 19, such a rate would be the proper annual percentage.

Par. 4 of art. 30 of the Ord. which is thus relied upon, provides that the valuation of land by the commission shall be based upon (*inter alia*) "any damage being the natural and immediate consequence of such prohibition as aforesaid, and of the taking possession of the land by Government under art. 14 of this ordinance, or of the delay which has occurred or will occur before the final decision of the Governor respecting the acquisition of the land."



It is necessary to ascertain what is the effect of the "proclamation" under ord. 1 of 1881, or of the notice "that the Governor in executive Council has declared that it is 'advisable to acquire the Land' provided for in art. 9 of ord. 10 of 1881.

The effect of the Proclamation is only to prohibit the destruction of trees, and as provided by section 2 of ordinance 1 of 1881, any person suffering "actual pecuniary damage in consequence of that prohibition" is to be indemnified. Ord. 10 of 1881 goes further with the interference with the right of property. The art. 35 says after service of the notice under art. 9 it shall not be lawful " (1) to destroy trees (2) to sell or exchange the whole or part of the land (3) to depasture cattle or cause any animal to feed on the Land."

Now the owner is entitled to compensation if he has suffered "damage as the natural and immediate consequence of the prohibition." He is therefore entitled to compensation only, if by being prevented from cutting down his timber or selling "or exchanging his land, or from sending his cattle to graze on the land, he has directly and immediately suffered a loss."

In the case before us, there is nothing to shew that the appellant has lost money, or what amount, by labouring under those prohibitions.

It is not shewn that she was actually cutting the timber on her land, thereby deriving an income or profit from her property, and that the proclamation has deprived her of that income; or that she had a herd of cattle, which she was in the habit of sending to graze on the Land, and that she has suffered a loss by being forbidden to do so, or that she had received a *bona fide* offer to sell her land for a price superior to what the Commission has allowed, and has been unable to sell in consequence of the prohibition to sell resulting from the notice.

Therefore I think it is impossible to say that the appellant has suffered loss as "the natural and immediate consequence of those prohibitions;" of course it is hard for a proprietor to be prevented from doing what he likes with his own—and it is quite possible that the prohibition to use, employ or dispose of his property as the owner may wish to do, may result in a prejudice to him. It is possible for instance to suppose that if the land had

not been proclaimed, some body would have been wishing to buy it at a very high price. But any such eventual or contingent prejudice does not give a right to compensation under the ordinance, which (whether rightly or wrongly we have not to say) allows compensation only for loss which is the natural and immediate consequence of the prohibition.

For the same reasons, I cannot say that the applicant is entitled to compensation for the delay which has occurred or will occur before the Governor's decision; because although this delay may eventually be a cause of damage, I have no materials on which I can say that Mrs Dioré has suffered or will suffer loss of Rs 10, or 10,000, or any loss as the immediate and natural consequence of the delay.

I do not think that the judgment in *Ravet vs the Government* can be invoked as authority in support of the proposition, that the effect of the Proclamation and notice is to deprive the owner of the use and disposal of his land, and thus to cause damage for which the owner is entitled to compensation.

The conclusion arrived at by the Judge does not support the appellant's view; for it was to this effect: the Court remitted to the Commission to amend its award by allowing to the appellant such an annual percentage upon the value of the land, (the Court did not say 70/100 or any other rate) as will in their opinion indemnify him for the damage, being the natural and immediate consequence of the delay which has occurred or will occur before the final decision of the Governor.

The conclusion is one which I think perfectly correct, if (as I doubt not) there was evidence to show that Ravet had suffered actual loss as the natural and immediate effect of the proclamation. If for instance it was shown, that he was actually engaged in cutting his timber and deriving an income from this work, an income which was stopped by his being prevented from cutting his timber, and continuing under that prohibition until the Governor's decision, I think he would be clearly entitled to compensation for the loss, as being the immediate and natural consequence of the prohibition or of the delay, that must elapse before the Governor has decided.

But this conclusion is very different from the one the appellant wishes us to arrive at, i. e. that the mere fact of the land being proclaimed, by depriving the owner of the

use and disposal of his land" gives a right of compensation in the shape of interest or an annual percentage (which is after all very much like interest) on the value of the property. The very position taken by the appellant before us, shows that this contention cannot be entertained, for the whole land of the appellant has been proclaimed, and yet we find that only half of it is under lease and producing rent, and that she claims compensation only for the part which happens not to be leased or to yield any revenue. It is clear therefore that the mere fact that land is proclaimed, does not take away the "use and disposal of it" since Mrs Dioré is actually deriving profit from 435 acres of proclaimed land, and that the mere fact of the land being proclaimed, does not give her right to compensation because though she has 435 acres proclaimed, she claims compensation for only 510 acres. Upon the law of the case, we must therefore arrive at the following conclusions.

10. The owner is not entitled to compensation simply because his land is proclaimed, but only when he can prove *damage* which is the natural and immediate consequence of the prohibition or of the delay referred to in article 30.

20. The compensation to which he is then entitled, must be equal to the loss proved to have been really suffered.

If it is shown that the owner's loss is of certain amount monthly or yearly, it is competent to give him interest on the value of the whole or a part of the property, at such a rate as will give him a monthly or yearly income equivalent to what he has lost. But to allow interest either at 7 o/o or any other rate, simply because the land has been proclaimed, and without proof of any definite loss coming within part of art. 30, would be an arbitrary proceeding, and one which is not authorized either by Ordinance 10 of 1881 or any other law of this Colony.

For the above reasons, I am of opinion that the appellant's claim to interest cannot be entertained, and as there is no other question in this appeal, that it should be dismissed.

#### JUDGMENT OF HIS HONOR A. MURE.

3rd April 1883

In this question, whether interest or compensation is due to the appellant in the circumstances of this case, I have arrived at the same conclusion as my learned brother who has just delivered his opinion. According to my notes of the argument of her Counsel, the appellant based her present claim (1) on the prohibition contained in the proclamation of her lands on 10th May 1881, its effects being to deprive her of the use of her property and the power of disposing of it, and that state of matters would continue so long as the purchase by the Government of her land was unsettled and (2) that the simple fact of the delay, or as I may rather call it, the lapse of time between proclamation and the determination of the Government, entitled the appellant to an indemnity in the sense that it constituted damages as contemplated by the ordinance.

The right which is given is a claim of "damage being the natural and immediate consequence of the delay which has occurred, or will occur before the final decision of the Governor respecting the acquisition of the land." If the simple delay in payment of a sum of money, which had been calculated as the value of the land at a certain date, and found due, had been contemplated as giving rise to the claim, I cannot help thinking that the word *interest*, and not the word *damage* would have been used. The use of the word *damage* clearly implies that the compensation to be granted, involves the idea of loss arising, or the deprivation of profit, in consequence of the delay. The Ordinance requires the condition of damage being the consequence of *delay*. I cannot read this as meaning that delay simply gives rise to the right here conferred. — There is besides that, the damage resulting from the delay. I have always considered that when damages were due, there was implied some "damnum emergens or lucrum cessans" in consequence of the act of the debtor in the damages. Undoubtedly when a claimant desires to make out a case for the commission exercising the powers conferred by 4th paragraph of article 30, he ought to give proof of the special damage he has sustained, either by the loss which has resulted and will result to him, or by the

deprivation of gain, which he has suffered. If there be no such proof and if the mere lapse of time is founded on, as giving the right, then I think it must be held that the claimant is not within the purview of the paragraph. It seems to me that these considerations derive greater force if the common law of this Colony be taken into consideration. If the claimant be put in the position of a creditor, to whom a fixed sum of money is due at a certain date, the Code in effect says:—damage is resumed—and no proof of special damage will be necessary (art. 1153). But then to entitle the party to this kind of damages, they are only due from the date of the demand in a Court of Justice, and are not due for however long a period of time may have elapsed before the action is raised.

This being the mode in which "intérêts moratoires" are given in our law, it is clear that a claimant under the ordinance now before us, does not in the least fall within its scope—It is also to be kept in view, that the Government of the Colony is to a certain extent placed in the position of a purchaser of land. But under another article of the Code the seller may either stipulate for payment of interest, or if the subject sold has been delivered and is productive of fruits, then only interest is due.—Hereto it is clear that a claimant under this Ordinance is not in a position to avail himself of that article of the Code.—The general rule then being, that interest does not run by the force of the Common Law, it is reasonable to interpret the paragraph under consideration as implying something more than mere delay or lapse of time.

But the claim of the present appellant being founded merely on that delay, and not upon proof of damage sustained by her or loss caused by the proclamation, or service of the Government notice on her under art. 9 of Ordinance No. 10 of 1881, so that she has lost any income, or profit derived from her land or been prevented from selling it at a higher rate than she has obtained, I have no hesitation in repelling the contention of the Counsel, and thus shortly stating my concurrence in the views of my learned brother in this case.

## SUPREME COURT

**MANDAMUS TO DISTRICT JUDGE SEYCHELLES**  
COMMANDING HIM TO RECEIVE AN APPEAL  
—ARTICLE 60, 61 OF ORDINANCE 34  
1852.—CASE IS NOT AN APPEALABLE ONE

*This is a motion for a mandamus to the District Judge of Seychelles, commanding him to receive a notice of appeal by applicant against a judgment delivered by him. The motion was resisted, as the judgment is not an appealable one.*

*The case was as follows: The applicant is a Notary of Seychelles, and tendered for registration a contract of marriage containing a donatio inter vivos, upon which a duty of 8 o/o was claimed. This was resisted by the applicant, who thought that only R. 0.25 could be charged. By consent the difficulty was submitted to the District Judge in Chambers, who held that the sum of R. 0.25 was properly charged.*

*It was further urged that the judgment was one concerning a right arising out of a contract of "Marriage", and that even if an appeal did not lie, the judge was bound to receive the notice of appeal.*

*Motion refused with costs.*

## EX PARTE

DUCHENNE,—Applicant

Before

His Honor L. Cox,—Third Puisne Judge

and

His Honor J. ROUILLARD,—Puisne Judge

V. KIVERN,—Of Counsel for Applicant.  
E. GANACHAUD,—Attorney for the same

- . M. GIBSON, — Substitute Procureur and Advocate General, — Of Counsel for the District Judge of Seychelles  
 . GUIBERT, — Attorney for the same

Record No. 21,895.

3rd April 1883.

- This is a motion for a *mandamus* to the District Judge of Seychelles, commanding him to receive a notice of appeal by the applicant against a judgment delivered on the 9th February last and to bind the applicant in recognizance for the prosecution of the appeal in terms of Article 61 of Ordinance No 34 of 1852. The motion is resisted by the Substitute Procureur General for the District Judge on the ground that the judgment is not an appealable one. For the applicant it was replied first that even if the matter at issue in the judgment is not of the appealable amount, the Magistrate is bound to receive a notice of appeal and to act upon article 61, when even such a notice is tendered to him and that his refusal will justify the issue of the writ. We think this argument is untenable. The writ applied for is a High Prerogative Writ, not to be obtained by merely asking for it and which will issue only when a strong necessity for it exists—as its object is to provide an efficacious remedy, it will not be granted if when granted it would be nugatory or useless. Now assuming that the Law imposes on the Magistrate the duty of receiving an appeal whenever tendered, it is clear that when the Judgment is one against which no appeal is competent, the applicant will not be benefitted by having the Magistrate commanded to receive such an incompetent appeal. But we think it clear that the law, articles 60 and 61 of Ordinance No. 34 of 1852, does not impose on the Magistrate the duty of receiving a notice of appeal when the matter at issue is one against which no appeal lies.

The applicant must therefore satisfy us that the judgment is one against which he has the right of appeal. From the affidavit it appears, that the applicant who is a notary at Seychelles, tendered for registration to the Registration Office there, a contract of marriage containing a "*donatio inter vivos*" upon which a duty of 3 o/o (or Rs 300) was claimed by the officer as the proper duty.

This was resisted by the applicant who thought that only R. 0.40 c. could be charged. By consent the difficulty was submitted to

the District Judge in Chambers, who held that the sum of Rs 300 was properly charged by the registration office. It is clear that in this judgment the matter at issue is under Rs 500—and therefore the judgment is not an appealable one under article 14 of Ordinance No. 10 of 1853, which declares final judgments in which the matter at issue does not exceed Rs. 500. It was further urged that the judgment being one concerning "a right arising out of a contract of marriage" the appeal would be competent under articles 14 and 3 of Ordinance 1 of 1853. But we cannot consider that the judgment by which the District Judge held that Rs 300 and not R. 0.40 c. was the proper duty payable to Government for the registration of the deed is one dealing with a "right arising out of a contract of marriage". Finally it was contended that under a proclamation of Governor Farquhar (No 247 of 4th Nov. 1817) which provides that all questions concerning registration dues will be submitted to the "Juge de Paix," subject to appeal to the Tribunal of First Instance of Mauritius, allowed the applicant to bring the Magistrate's Judgment for appeal before the Supreme Court which has replaced the Tribunal of First Instance. This argument again we must reject. There is no Juge de Paix now at Seychelles, nor have we here any judgment by such an officer. He has been replaced by the District Magistrate or Judge, and judgments given by that officer are final (whether in revenue or other cases) unless they are such that an appeal is competent under the provisions of Ordinance 22 of 1853.

The motion is refused, with costs.

## SUPREME COURT

APPEAL BY MANDATORY HOLDING A GENERAL POWER.—A SPECIAL POWER OF ATTORNEY, TO APPEAL IS NOT NECESSARY.

*This is a judgment upon an objection raised to an appeal lodged by the plaintiffs against a judgment of the Master, sitting as Commissioner in Bankruptcy.*

*The appellants are mandatories of merchants in India who are creditors of the defendant. Before the Master their power to act was*

*not questioned, but on their appealing from the Master's decision the defendant contested their right to do so on the ground that they required for that purpose an express power of attorney.*

*Held that the objection was not a valid one.*

—

Before

His Honor A. MURRE, — Second Puisne Judge

and

His Honor L. COX, — Third Puisne Judge

—

PURTHA & ors — Plaintiff

. versus

ESSACK — Defendant

—

Judgment on preliminary Objection

—

W. NEWTON, — Counsel for Plaintiff

F. ROBERT, — Attorney for the same

L. ROUILLARD, — Of Counsel for Defendant

G. HERCHENRODER, — Attorney for the same

—

Record No. 21,893.

17th April 1883.

In this case a preliminary objection has been taken to the competency of the appeal. It appears that the debtor here, Essack presented a petition for arrangement under the Bankruptcy Ordinance of 1852 before the present Bankruptcy Judge, the Master of the Supreme Court, who, by a certain Ordinance comes in place of the Judges of the Supreme Court as Commissioners in Bankruptcy. The Statute requires that such a petition shall be served upon all the creditors a certain number of days before the private meeting, as it is called, at which it is to be considered by the creditors along with the Commissioner in Bankruptcy. That is the requirement of the Ordinance on the subject, and in accordance with that requirement the Bankrupt,

who proposed to pay his creditor 25 per cent of their debts on condition of receiving a discharge in full, served the required notice upon four gentlemen in Port Louis, as duly representing four different merchants in Bombay. These gentlemen did attend the private meeting before the Commissioner in Bankruptcy at which the deed of arrangement was to be considered. They affirmed the debts of their respective principals, and they took part in the deliberation under which the arrangement was to be held valid or not valid. Under the Ordinance the arrangement must be affirmed by three fifths in number and value of the creditors, now that having been done, these persons appear as dissentients, and they appeal this resolution of the creditors of the Bankrupt to the Supreme Court. It is to be remembered that under this statute the enactment as to appeal is this, that every Commissioner is to have superintendence and control in all matters of Bankruptcy and shall hear and determine every possible question that shall arise, subject in all cases to an appeal to the Supreme Court, and it is under these words that this matter comes before us. Now when the matter does come before us, a preliminary objection is taken, that a special power of attorney is necessary in order to make a valid appeal and to entitle the party to appear here in this Court and under this appeal; and we had a very able argument submitted to us by Mr Rouillard, in which certain authorities were quoted to the effect that a petition of appeal was a new procedure and a new instance, and that that being so, a special power of attorney was necessary, even to a mandatory who had the right to bring the original action. He quoted as authority from Carré and Chauveau (Dictionary of Procedure) with reference to the Code of Civil Procedure and the law of appeal in that Code. Now I have no hesitation in saying that I do not think that that Code applies. There is no doubt indeed that it does not apply, and the special doctrine quoted to us therefore is not binding on us and has no authority in this matter. But he maintained that the law on that subject was merely derived from the general law of mandate in the Code. It is of importance in considering this matter, that we consider the kind of power which it is admitted these due representants of the parties in Bombay had, whether it is a special or a general mandate which they had. Under the 1987th article of the Code, the mandate may be either special or general, and I think the power which a party, who represents a firm of merchants abroad, must be a very general power

indeed, covering all the affairs of the mandant, and enabling the agent to attend to every interest of the mandant which is in jeopardy. On the other hand there are very serious obligations arising out of that power—there is undoubtedly in such a case, the obligation to pay the price of all goods in this Colony he has ordered for his foreign principals, but Mr Rouillard argued that the power which a mandataire had, even to receive the price of the goods, did not authorise him to raise actions for the amount. I do not wish to call that law in question, but I make the remark that that must be where there is a special mandate given, and so, I think the remarks of Laurent must be interpreted. In sections 437 Vol. 27 of this work, he is going over the cases in which special mandates have been given." Le mandataire est chargé de recouvrer une créance c'est-à-dire de recevoir le paiement—Pourrait-il tirer sur le débiteur ? " and in article 438 he says : " Si le débiteur ne paye pas, le mandataire aurait-il le droit de le poursuivre en justice ? " It is perfectly clear to any mind that Mr Laurent is then considering the case of a special mandate, and whether that special mandate can be extended to some thing beyond that which is specially stated in the mandate. Now that is not the case which we have here to determine. We have here to determine the case evidently of gentleman who must hold a general mandate, because they duly represent foreign merchants in this Colony, and if duly representing foreign merchants in this Colony, I think their mandate must be considered a general mandate, and not a special mandate. But while I make these remarks upon the argument submitted to us, the judgment of the Court does not depend very much upon these considerations, for I am of opinion (and my learned brother I believe is also of the same opinion) that in this case the bankrupt Essack, the respondent here, has by his own action and conduct barred himself from taking the objection which he now does.—He has summoned those parties to appear in this bankruptcy arrangement, he has asked them to make affirmation of the debts which he himself owed their principals, he has asked them to vote for his proposal, that they should accept 25 per cent and give him an entire discharge of all his debts. He has asked them to do all that without any objection on their part, he has not at any one moment stated to them.—" If you do not choose to assent to what I propose, I will turn round upon you " and refuse to acknowledge your right " but these gentlemen having some ground of which we know nothing, to object to this

arrangement, and which they desire to bring under our notice, take an appeal, and then the bankrupt turns round and says : " I deny your right to appeal, and I put it on this ground, that this is a petition of appeal and therefore is a new instance ". I think we cannot listen to that argument from him in the circumstances of this case. He has recognized them as the general representatives of his creditors, who are parties abroad, and having done so, and this matter being an appeal in bankruptcy (regulated as I have said, that we must consider ourselves as two branches of the same Court, and not as different Courts that the Master is sitting as a Commissioner in bankruptcy) all that he has done is subject to an appeal to the Supreme Court of this Colony. Viewing the matter in that light, I have no hesitation in saying that this objection is not a valid one, and cannot be upheld.

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JUDGMENT OF HIS HONOR L. COX.

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I am of the same opinion. I think the respondent must be taken to have admitted that the parties, who appear on this record as representing the appellants, were really the representatives and agents of the appellants, and had sufficient authority to represent them in the proceedings before the Master. That admission results clearly from the admitted fact, that those parties were called to appear before the Master, as representing those Bombay merchants, to shew cause against the proposed arrangement. The question, it seems to me, comes to this, whether those people being agents and having sufficient authority to represent their principals before the Master, can raise this appeal in their name, without an express power of attorney, and Mr Rouillard, as I think, very properly restricted his objection to that point. This as a point of law is made to rest upon the opinion of Carré and Chauveau, in their commentaries on article 484 of the Code, in which they laid down certainly that a party in order to appeal in matters of this kind, must have an express power of attorney. Those french authorities we always follow, and we find them to be of great assistance, when they purport to construe a text of the french law which is also in force in this Colony, but here their opinion is expressed in connection with a system of french procedure as to appeals, and it is in connection with an article of the Civil Procedure

which has no application in this Colony. Therefore I think what Carré and Chauveau say as to that matter, with regard to the parties who have authority to appeal in France, can have no application to this case. The other authority that we were referred to, Laurent, does not appear for the reasons given by my learned brother, to have any bearing on this question. Therefore, apart from authority, the question is, have we any thing like principle or justice, or reason, to support this objection? I think not, I think if those people who appear on the record as agents of the Bombay merchants, are admitted to be their agents before the Master, so as to make the judgment of the Master binding upon their principals, it would certainly not be fair to say, that they are not their agents when they seek to relieve their principals of the consequence of that judgment. I think therefore, that neither on authority nor upon principle can we support the objection now raised, and I must come to the conclusion that it is not valid.

### SUPREME COURT

APPEAL FROM DECISION OF DISTRICT MAGISTRATE FLACQ —EMBEZZLEMENT.—AMBIGUITY IN INFORMATION.—ACCUSED NOT FORMALLY CALLED UPON TO DELIVER MONEY —ONLY PART OF AMOUNT CHARGED SHOWN BY EVIDENCE TO HAVE BEEN PAID TO DECEASED.

*This is an appeal from a decision of the District Magistrate of Flacq, condemning the appellant to three months imprisonment for embezzlement.*

*The appellant was employed by the defendant as a hawker of bread; he was charged with having embezzled the money he had received for certain loaves entrusted to him.*

*The appeal was based on the following grounds:*

10. *Because the information is ambiguous inasmuch as two deposits or trusts are mentioned in it; the deposit and trust of the money, and likewise that of the bread.*

*Held that this objection cannot be supported, as the bread was mentioned to explain how the money came into the appellant's possession.*

20. *That the appellant had not been called upon to deliver the money he had received for the bread.*

*Held this was unnecessary, as a fraudulent intention of appropriating money entrusted to a person may be inferred from the circumstances of the case.*

30. *That the appellant was charged with having misappropriated Rs. 11.04, and from the evidence it was only shewn that Rs. 5.03 had been paid to him.*

*Held that the delivery of the Rs. 5.03 was sufficient to support the Magistrate's finding.*

*Appeal dismissed with costs.*

—  
AH-HEET,—Appellant

versus

—  
THE QUEEN,—Respondent

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor L. COX,—Third Puisne Judge

—  
V. DELAFAYE,—Counsel for Appellant  
H. BERTIN,—Attorney for the same.

J. M. GIBSON, Substitute Procureur General,  
Counsel for Respondent  
J. GUIBERT,—Attorney for the same

Record No. 496

—  
JUDGMENT OF HIS HONOR L. COX

—  
20th April 1888

This is an appeal from a decision of the District Magistrate of Flacq sentencing the appellant to three months imprisonment on a charge of embezzlement.

The information upon oath is in these terms "One Ah-Heet, of Centre of Flacq, in the said district, a hawker of bread, in the complainant's service did wilfully, unlawfully and fraudulently embezzle and squander certain moneys, to wit, eleven shillings and four cents to the prejudice of the owner thereof, to wit, the said Léonard Daugues which said sum was the value of one hundred and fifty eight loaves of bread en-

“ trusted to the said Ah-Heet by complainant  
 “ for the purpose of being sold to Heelooman  
 “ and Vythelingum, which said moneys had  
 “ theretofore been delivered to him the said  
 “ Ah-Heet by the said Heelooman and Vythe-  
 “ lingum, merely in pursuance of a deposit  
 “ or trust with the condition that the same  
 “ should be returned or employed for a  
 “ special purpose, to wit, for the purpose of  
 “ being handed over to complainant.”

Now it is urged that this information is ambiguous because there are two deposits or two trusts mentioned in it, there is the deposit or trust of the sum of money itself, the Rs 11.04, and the deposit or trust of the 150 loaves. Upon reading over the information carefully I think this objection cannot be supported. I find that the embezzlement which is charged, is the embezzlement of a sum of money Rs 11.40. It is averred, in the first place, that this sum was delivered to the appellant in pursuance of a deposit or trust, and there is also the averment that that sum having been so delivered to him, was by him embezzled and squandered to the prejudice of the owner thereof. Those averments make a sufficient charge of embezzlement. It is true it is explained how the money came into the man's possession, that it was the produce of a quantity of bread, which he was instructed to sell; but I do not think there is that ambiguity which is sufficient to vitiate the information, and therefore I think this ground of appeal cannot be entertained.

The next objection is, that there was no evidence before the Magistrate in support of the charge. It was argued first of all, that the defendant had not been put “ en demeure ” to deliver the money. I quite admit, as a matter of principle, that when a man has received money for another person, he cannot be charged with embezzlement, before he has been called upon to return the money, and there has been something amounting to a refusal on his part to do so; in the majority of cases therefore, an act of some kind, either a “ mise en demeure ” or a formal request by the owner of the property, is necessary, but I cannot say that it is always necessary, because the object of the “ mise en demeure ” or of the formal request, is to prove on the part of the person holding the money, a fraudulent intention to misappropriate, and that may undoubtedly result from the circumstances of the case. If it is proved that the man having received money for another person, for which he is bound to account to the owner, absconds with that money, and when he is arrested some

short time afterwards, denies having received it, those are circumstances from which a reasonable man must infer, that he had the intention of appropriating the money.

Now, here before the Magistrate there was evidence to shew both circumstances, there was some evidence to shew that the man had run away from his employer's service, and there was also evidence to shew, that when he was arrested by the police, he denied having received the money. I think upon those facts, it was quite competent for the Magistrate to find that there was an intention to misappropriate the sum of money, and therefore no “ mise en demeure ” was necessary at all.

It was also said that only one of the two persons who were stated in the charge to have delivered the money to the prisoner, Heelooman and Vythelingum, was called. That is perfectly correct. Only one of them was called, Heelooman, and he proved the delivery to the appellant of the sum of Rs 5.03; the other man who was to prove the delivery of a sum nearly equal to that was not called, but I think, in the first place, that the delivery of one of the sums having been proved, is quite sufficient to support the Magistrate's finding, and to support the conviction; besides that, I think there was some evidence before the Magistrate to shew that the man had actually received the whole amount, and that resulted from his own conduct, because when he was brought before the Magistrate, he tendered in Court the whole amount which he was charged with having embezzled. In those circumstances, there was evidence to go to a jury on the question whether the whole of the money was received by him. The Magistrate heard evidence on that fact, and I think that we cannot interfere with his decision.

With regard to the penalty inflicted by the Magistrate on the appellant, which was one of three months imprisonment I think it was a perfectly proper one in the circumstances of the case, and I think therefore that this appeal must be dismissed with costs.

JUDGMENT OF HIS HONOR A. G. ELLIS

20th April 1883.

I am entirely of the same opinion.



## SUPREME COURT

## CLAIM OF SEVERAL PORTIONS OF LAND—TEN YEARS PRESCRIPTION ON "BONA FIDE" TITLE.

*The plaintiff in this case claims several portions of land at Moka, now forming part of the Estate "Côte d'Or." He founds upon four notarial deeds, dated 1880 and 1881, by which he purchased this land from persons whose immediate predecessors or who themselves, had purchased the land from one Furcy Herbereau de la Chaise.*

*The land in dispute was left by Furcy Herbereau de la Chaise at his death to a family named Rose, by whom it was sold at the Bar in 1847, with the remainder of the land they inherited. In 1850 the whole land, including the portion now claimed by plaintiff, was sold to Mr. Clément Ulcoq, who by several deeds, the last sale being in 1861, sold the land to defendant.*

*The defendants plead that the land had been conveyed to them by regular and written title, and they plead ten years prescription with the necessary possession on a just title and in good faith.*

*Action dismissed with costs.*

• **POUGNET,—Plaintiff**

*versus*

**DESVEAUX DE MARIGNY & OTHERS,**  
Defendants

—  
Before

**His Honor Sir A.G. ELLIS, Kt.—Chief Judge**

and

**His Honor A. MURE—Second Puisne Judge**

**L. ROUILLARD,—Counsel for Plaintiff**  
**P. F. LASTELLE,—Attorney for the same**

**W. NEWTON,—Counsel for Defendant**  
**H. LECLÉZIO,—Attorney for the same**

Record No. 21,621

20th April 1883

• In this case the plaintiff seeks a decree from the Court, that he is the true and legal owner of three pieces of land of the extent

respectively, of one acre, one and a quarter acre, and two acres, situate at Moka, and forming part of the Estate "Côte d'Or", which Estate is, and has been for more than twenty years, in the possession of the leading defendants. The plaintiff founds his claim on four notarial deeds executed in the years 1880 and 1881, by (1) one Euphrosyne Larose (2) one Marie Louise, otherwise called Louise, and (3) one Jean Evenor Tonta, and (4) one Pierre Noël Tonta, and he claims the three portions of land of the respective contents above noted, and described in those notarial deeds as having been sold to the granters of these deeds or their immediate predecessors, by one Furcy Herbereau de la Chaise.

From the documents in process, it appears that Mr H. de la Chaise was for some years before his death, which took place about the year 1847, the owner of an Estate in Moka, which extended to 402 acres and 55 perches. He sold portions thereof at the east corner of his Estate to several small proprietors, and at his death, he was in possession of 330 acres or thereabouts. It turns out that the pieces of land now claimed by the plaintiff, are part of these 330 acres, and are entirely surrounded or hemmed in by the remainder of these acres. They are no parts and, are not maintained to be parts, of 72 acres of the land sold to the various small proprietors above mentioned. For convenience we may call these 330 acres the "Terrain Lachaise", as indeed so it is styled in the later title deeds of the "Côte d'Or", of which it forms a part.

At his death, Mr H. de la Chaise was found to have constituted a family of the name of Rose, his universal legatees, and the terrain Lachaise, which was part of his succession described in the Cahier des Charges as containing 330 acres or thereabouts and as bounded on the east by various small proprietors, on the south by the properties of the deceased Thomé, on the north by the River Cascade, and on the west by the property Hugnin of assigns, was sold by licitation at the bar of the tribunal of first instance, and was on 10th February 1847 adjudged to certain members of the family of Rose. On 20th February 1853 the same Estate of 330 acres described and bounded in the same way as in the above Cahier des Charges, was sold by the adjudicatees of the family Rose to Mr Clément Ulcoq, advocate. The latter again by two sales, on 19th January 1851 and 15th March 1861, sold the same Estate described and bounded in the same way and stated to con-

tain 330 acres to Mr Marin Desveaux and the other defendants, Mr Ulcoq had married a lady of the Desveaux family, and certain family arrangements took place, which it is unnecessary to go into in detail. From the deeds it appears that Mr Ulcoq was at first sole proprietor of the Estate called Terrain Lachaise, he sold two ninths of it to Marin Desveaux, and six ninths to other Desveaux, reserving to himself one ninth of the two ninths acquired by him, Mr Marin Desveaux resold one ninth to Madame Ulcoq, but by the last deed mentioned (15th March 1861) Mr and Madame Ulcoq again disposed of their interest of two ninths to the Desveaux, who from that deed became the entire owners of the said Estate. The defendants depone in their evidence, that in 1859 they took possession of the whole land between the "River Cascade" and the line separating the "Terrain Lachaise", from the various small proprietors which constitutes its eastern boundary, and it is in evidence not only by them but by others, that Mr Ulcoq himself pointed out the boundaries to them stating at the same time that this title was quite "en règle". But the evidence of possession does not depend on the defendant's testimony; four of the plaintiff's witnesses all admit, that from 20 to 25 years back, the defendants, the Desveaux, took possession of the three plots of ground now claimed by the plaintiff, along with the rest of Terrain Lachaise, and from that date up to the present, have planted canes thereon.

As the defendants plead that the lands claimed by the plaintiff are part of the terrain Lachaise, and found on the purchase by Ulcoq from Suzette Rose and others by notarial deed, and that the said land has been conveyed to them by regular and written titles, and as they plead the ten years prescription with the necessary possession on a just title and in good faith, we consider that these pleas, if well founded, exclude consideration of any other plea, and form a complete answer to the present claim. A prescriptive title of ten years or upwards is undoubtedly the highest and best title to property which a man can possess. In acquiring the property, such an owner has taken care that his seller has an apparently good and legal title to it, on the faith of that, he has cultivated the land with crops, and probably invested large capital in it fitting it to bear these crops. The law of all civilised countries, takes care that uncertainty should not hang over the rights of such a purchaser for a longer period of years. Hence the rule of our Code, that he who

acquires in good faith and by a just title the possession of an immoveable subject, prescribes the property of it in ten years. The first question we have to consider, is whether the defendants acquired their possession in good faith.

We have in the first place to eliminate from this case, the plot of land of two acres alleged to be sold to Aristide Tonta. The plaintiff's authors of that name have failed to prove legally that they are the nephews and heirs of that person, and the claim of the plaintiff to his two acres is given up. In like manner the relationship of Marie Louise to Charles Lendormi, who were the alleged joint purchasers of one acre and a quarter of land from de la Chaise, has not been established, and the plaintiff gave up also the claim to Lendormi's share. There remains only the plot alleged to have been sold to Euphrosyne Larose, and the half plot of Marie Louise. But the former acquired her plot of ground for three months only, and then, as she says, abandoned it. This was long before the licitation took place, at which time if ever she intended to claim the land, she ought to have done so. But the good faith of Ulcoq, who knew nothing of Larose's secret deed, did not see her on her land, and heard of no claim be her, cannot be doubted in regard to her lot. Marie Louise was examined as a witness, but not in regard to her own plot of ground; she was not asked and did not explain how she was dispossessed of it. She spoke of the land of Larose and of Tonta, and thought she could point them out, but of her own land all she says is "Desveaux took possession of my land and planted it with canes." This evidence is probably explained by an incidental remark of Mr Marin Desveaux, that he knew a woman Marie Louise who claimed some kind of right to a bit of the land, but had sold it to Mr Ulcoq. It is quite possible therefore, that Mr Ulcoq without knowing the existence of the private deed by de la Chaise to Marie Louise, but hearing that she had paid a few dollars for the bit of land she occupied, had paid her that sum and got quit of her. Be that as it may, it is clear that as good faith is always to be presumed, there is no evidence displacing that presumption, either in the case of Ulcoq or of Marin Desveaux, and the other defendants, in reference to Marie Louise plot. It is perhaps enough to dispose of this part of the case, to shew that the presumption of good faith holds in regard to these two plots. But it is right to remark that the good faith of Messrs Desveaux in taking possession of the whole "terrain Lachaise", is

undoubted. There is evidence that the land between the boundaries belonged to and was possessed by Ulcoq, and that he with the witness Rose, pointed out these boundaries to Messrs Desveaux and delivered to them possession of the whole land. It is clear they must have had the conviction that all that was delivered to them became their property, as they knew that their author was the proprietor of the subject, and therefore they were then of good faith. Some attempts were made to invalidate this position, by showing that claims for land had been subsequently made against the Desveaux. But that article of the code is to be remembered, which enacts "La bonne foi suffit au moment de l'acquisition" (article 2269), and the subsequent emergence of claims which, so far as appears, were never substantiated, will not in the least degree detract from the good faith which then undoubtedly existed.

Of the second condition of the ten years prescription viz: a just title, there is no doubt. It begins with an adjudication at the bar of the tribunal of first instance, which is done only after advertisements, which are meant to notify to all concerned to make claims on the subject if they have any. None of the plaintiff's authors then appeared, and the adjudicatees possessed the subject for six years, and then sold to Ulcoq, from whom in 1857 and 1864 the present defendants acquired it. There is no doubt they were entitled to believe that the legal owner had transferred to them the right of property, and the deeds being regular and formal, there is equally no doubt that their title was complete. We have therefore no hesitation in sustaining the plea of prescription, and we dismiss this action with costs.

## SUPREME COURT

### VERBAL LEASE.—ACTION FOR POSSESSION OF PREMISES LEASED UPON VERBAL LEASE.—DAMAGES FOR NON PERFORMANCE OF LEASE.

*The defendant in this case was the tenant of a house at Moka, which he had leased for three years. After the expiry of about 18 months he desired to leave the house, and communications took place between the plaintiff and the defendant, with a view to the former's occupying the house from the 1st January 1883.*

*The plaintiff's case is that on the 14th December last he met the defendant at the house in question, and then and there entered into a verbal lease, by which he consented to lease the premises for a year at an annual rent of Rs. 90 per month, renewable for six months at his option.*

*That he was to obtain possession of the house on and from the 1st January 1883, but that the rent was to run merely from 1st February; that he offered to put the agreement in writing, but that the defendant considered it unnecessary to do so.*

*Later in the day, the defendant requested the plaintiff to enter into a lease which he consented to do, but on the plaintiff's understanding that that the deed was to take the shape of a notarial deed, he declined to bear the expense of the deed if it exceeded a certain sum, which he named.*

*On the 29th December, the defendant addressed to plaintiff calling upon him to decide whether or not he would enter into a notarial deed, and warning him that if he failed to comply with his requirements by 7 a. m. the next morning, he (the defendant) would not trouble the plaintiff any more and would make his own arrangements. The plaintiff declined to comply with this summons, and informed the defendant that he would hold him bound by his verbal agreement.*

*The house was subsequently handed over to Mr Gahan who is not a party to this suit.*

*The plaintiff claims the performance of the verbal lease made to him, and that the defendant be condemned to pay damages for his failure to carry out the lease.*

*The Court held that the plaintiff had succeeded in establishing the existence of a verbal lease between him and the defendant, in virtue of which he is entitled to demand of the defendant possession of the premises in question. It reserved to him all rights competent to him, should the defendant fail or delay to execute this obligation, and further found the defendant liable in damages to the extent of Rs 300 and in the costs of this action.*

GALEA—Plaintiff

versus

HODGSON—Defendant

Before

His Honor Sir A. G. ELLIS, Kt., Chief Judge

and

His Honor J. ROUILLARD, Puisne Judge

Y. JOLLIVET,—Of Counsel for Plaintiff  
L. WOHRNITZ,—Attorney for the same

R. M. BROWN,—Of Counsel for Defendants  
E. LEBLANC,—Attorney for the same

Record No. 21,841.

23rd April 1883.

In November last the Defendant in this action, Mr Hodgson, occupied a house known as "Petit Gentilly" situate in the District of Moka. The house belonged to Dr Alfred Wheldon, and was held by the defendant on a verbal lease, which had then upwards of 18 months to run. As the defendant was anxious to leave the house at the end of the year, and had reason to believe that it might suit the plaintiff, interviews took place and letters passed between them on that subject. Ultimately however, on 30th December, the defendant wrote to the plaintiff stating that he had "made other arrangements about subletting his house" and handed over possession of the house to a Mr Gahan, who is not a party to this suit.

In these circumstances the present action was instituted. In his declaration the plaintiff alleges that on or about the 10th of December the defendant verbally agreed to sublet to him "Petit Gentilly" for one year, reckoning from 1st January 1883 — with the option of continuing to occupy the house for an additional period of six months, at a monthly rent of Rs 90—that this agreement was subsequently modified to this extent that the plaintiff should only take possession of the house from 16th January last, and that, in breach of his undertaking the defendant failed and refused to give him possession of the house. On this narrative, judgment is craved, ordering the defendant to hand over to the plaintiff possession of the house, and until compliance with such order, to pay him Rs 10 per day as damages from 16th January last. When the case came before us, the

defendant did not object to the admissibility of oral evidence, and witnesses were accordingly examined at considerable length on both sides. As however no one but the plaintiff and defendant were present at the interview at which the plaintiff alleges that the verbal agreement was come to, or at the subsequent interviews between the parties, our decision must mainly rest upon the depositions of the plaintiff and defendant respectively, when read along with the letters which passed between them. These depositions vary in essential particulars, but we readily believe, as was assumed throughout the argument, that these variations are solely attributable to defective memory, and involuntary inaccuracy in recapitulating the details of conversations exchanged some time previously to the date when the parties were examined.

Both parties agree that after some unimportant preliminary communications had passed between them, they met together at "Petit Gentilly" on the morning of the 14th December, with regard to what passed at this interview, the account given by the plaintiff on the one hand, and by the defendant on the other, do not agree. The defendant stated that at this interview no definitive agreement was come to between him and the plaintiff, beyond this, that they agreed that the rent of the house should be Rs 90 a month, and that the duration of the lease was to be for one year.

The defendant denied that any agreement was come to as to the date at which the plaintiff should obtain possession of the house, or that he rejected a suggestion made by the plaintiff that the agreement should be reduced to writing. He stated that, on the contrary it was clearly understood on both sides that an agreement embodying all the conditions of the lease was to be drawn up subsequently. The plaintiff on the other hand, deposes that at this interview a final agreement was come to between him and the defendant, by which the latter agreed to sublet the house to him for one year, with the option of continuing in it for six months longer, he (the plaintiff) agreeing to pay rent at the rate of Rs 90 per month; that further it was agreed that he should obtain possession of the house from 1st January, rent only running from 1st February, that the question whether the agreement should be reduced to writing was suggested by him, but that as the defendant said he did not care, or would do as the plaintiff liked, he, the plaintiff said that he did not think it necessary; and that throughout the interview, there

was no mention or suggestion of further conditions to be subsequently discussed and embodied in writing. There can be no doubt that these two versions are substantially different, according to that given by the defendant, there was no binding contract concluded between the parties. The plaintiff and defendant agreed on two points, the duration of the lease and the amount of the rent; but one essential element of every lease, the date from which it was to begin, was left unfixed, and it was clearly understood that other conditions remained for future discussion, and were to be embodied in an agreement to be drawn up. If however the plaintiff's version is to be preferred, all the conditions essential to a lease had been agreed to, it had further been resolved that it was not necessary to reduce the contract to writing, and nothing was left for future arrangement; the interview had resulted in a perfect verbal contract, from which neither could withdraw without the consent of the other.

The determination, which of these versions must be preferred, is therefore vital to the decision of this case. The two main points of disagreement between the parties are: 1o. whether a term was agreed on, at which the plaintiff should receive possession of the house, and 2o. whether the question of reducing the agreement to writing had, or had not been discussed at the interview, and whether it was or was not the understanding of parties that a writing embodying further conditions should intervene.

Let us see whether the doings of the parties, or the letters which passed between them, throw light on these points. On the first point it is important to notice that the defendant in a letter addressed to the plaintiff on the 24th November, says "I leave the house on the 31st December." This being the defendant's resolve before the interview of the 14th, we find that at that date arrangements had already been made by him for selling his furniture, and the sale advertised as to take place on the 23rd December. Mr Mayer, the auctioneer says that there existed objections to the sale taking place at this date, which he pointed out to the defendant, who replied that he could not postpone the sale as he was leaving "or" was obliged to "leave the house;"—such being the state of matters, the plaintiff deposes that some days after the 14th, the defendant saw him and represented to him that if his sale took place on the advertised date he would lose money.—Thereupon the plaintiff states that, to oblige him,

he consented to defer moving into the house, until the 15th January, as a matter of fact the sale of furniture was postponed to the 13th of January—and though there is some manifest confusion of dates, we cannot doubt that this change in the date fixed for the sale, took place after the plaintiff, at the defendant's request, had agreed to defer moving into the house for 15 days. The deposition of the plaintiff on this point, which is not contradicted by the defendant's oath, strongly corroborates the plaintiff's statement that a term of entry had been agreed on between him and the defendant. If such an agreement was come to, it must have been come to on the 14th, and if no such agreement had been made, it is unaccountable that the defendant should have deemed it necessary to consult the plaintiff before postponing the sale—a step which his interests demanded.

Taking this along with the fact that on the 14th the plaintiff wrote to his then Landlord giving up the house he then occupied, we cannot doubt that the statement of the plaintiff, that on the 14th it was agreed that he should have possession from a given date, namely 1st January, is entitled to credit, and that in this respect, the plaintiff's version of what took place at his interview with the defendant is the more accurate and must be accepted in preference to that of the defendant.

We pass now to the second point, with regard to which a discrepancy exists between the version of the defendant and of the plaintiff, as to what passed at the interview of the 14th viz: whether, as the defendant asserts it was "clearly understood", that an agreement containing further conditions to be mutually agreed on, was to be drawn up, or whether, as the plaintiff alleges, the idea of reducing the agreement to writing had been mooted by him, and rejected as unnecessary by the defendant. On this point, we think that the terms of two letters exchanged between the parties on the very day of the interview (the 14th), remove all doubt as to which of these statements must be accepted as accurate.

The first of these letters is written by the defendant, and runs thus:

"My dear Galéa,

"To satisfy Wheldon, I should like to hand over to him a written agreement from you. If I have one drawn up to-morrow I

" suppose you will have no objection to sign  
 " it ? The terms will be plain and simple  
 " and not composed of 150 clauses.

" In haste

" Yours very truly

" F. A. HODGSON

" P.S. Let me have a reply early as I shall  
 have every thing done to-morrow. Yours

" F. A. H.

It appears to us that this letter is couched in terms which, on the one hand are not consistent with the version given by the defendant on the point under consideration, and on the other, entirely bear out the disposition of the plaintiff.

This is certainly not the letter of a man who writes under the impression that nothing had been definitely settled between him and the plaintiff, and who " clearly understood " that a written agreement of lease, embodying conditions still unsettled, was to supervene. On the contrary, the language is that which would be employed by one, who felt that, so far as he was concerned, there was no necessity for any writing, and who asks the person to whom he writes to concede something out of consideration for the scruples which another person may entertain. It is not a note calling on the plaintiff to do what he had undertaken to do, but a request that he will do something, which he might object to do, and which could only be done after his assent had been received.

If we turn to the plaintiff's answer of the same date—these conclusions are confirmed. He writes.

" My dear Hodgson,

" Nothing more natural and proper than  
 " what you ask. I will gladly sign a lease  
 " embodying the terms agreed upon between  
 " us this morning. As you may recollect,  
 " I offered to do so, when speaking to you to  
 " day

" Yours sincerely

" H. GALÉA.

The last clause corroborates entirely the plaintiff's deposition with regard to his hav-

ing suggested at the interview that a writing should be drawn up—and the whole term of the letter is not that of one who assents to something which it had been understood should be done, but that of one who acquiesces in what had been proposed and rejected, and complies with a request that a contract already concluded should be put in writing.

The conclusion to which we come therefore, after considering the evidence before us, is, that on the two essential points on which the plaintiff's version of what occurred at the interview on the 14th, conflicts with that given by the defendant, the account given by the former must be accepted as the more accurate representation of what took place. As we have seen however, if the plaintiff's version be, as we think it must be, accepted as correct, a definitive contract by which the defendant sublet his house to the plaintiff, was concluded on the 14th.

The subsequent communications, between the parties were fully gone into in the proof adduced; but we do not deem it necessary for the decision of this case to go into them in detail. Having arrived at the conclusion that a definitive verbal agreement was come to between parties on the 14th December, the only matter essential to the issue before us is to ascertain whether subsequently the plaintiff can be held to have in any way liberated the defendant from the obligation which he had undertaken. From certain letters exchanged between the defendant and Mr Raoul, it appears that between the 14th and the 29th December, the defendant became desirous that clauses prohibiting destruction of timber, and requiring the punctual payment of rent, should be introduced into the written lease to be drawn up. To the insertion of these clauses the plaintiff could have had little reason to object, as they merely amount to the expression in the lease of what would have been legally implied. The defendant further, however, became very anxious that the writing which the plaintiff had consented to sign, should take the form of a notarial deed, such a stipulation clearly could not have been forced on the plaintiff, who under the terms of his verbal agreement was not bound to reduce it to writing, and who in his letter of the 14th, merely consented to sign a lease embodying the terms of his agreement with the defendant; a concession which by no means implied that he agreed to execute a formal notarial deed. The evidence before us however satisfies us, that the plaintiff made no objection to sign such a notarial deed, but that he

declined to pay the notarial fees, unless these were moderate in amount and did not exceed Rs 30 or thereabouts.

This position we think the plaintiff was entitled to assume, and did assume on the 29th December at an interview between the parties in Port Louis. The defendant left this interview to ascertain from his notary what the expense of a deed, such as he desired, would be. He failed however to see his notary, or to ascertain the amount of his fees, and returned to the plaintiff's Chambers.

The defendant deposes that the plaintiff then undertook to ascertain the legal charges, and to inform him whether he would consent to bear them, that same evening. This statement however does not tally with the plaintiff's account of the understanding come to between them on this occasion. He states that as, at that date (29th December), many business offices had already closed for the new year holiday's, it was agreed that he should ascertain the amount of the fees chargeable for a notarial deed of lease, and communicate further with the defendant on the following thursday, the 5th of January. Here again there is a material discrepancy between the statements of the plaintiff and defendant, and here again a letter written by the defendant on the very evening of the interview, contradicts the version given by him, and corroborates that of the plaintiff.

The defendant writes: Referring to our conversation of to day . . . . .

"I find it is utterly impossible for me to allow you until thursday next to decide whether you enter into a written lease or not;" language which is utterly inconsistent with his statement that it was agreed at that day's interview that the plaintiff should inform him that very evening whether he would consent to bear the expense of a notarial deed: but which is exactly that which we should expect from one, who, having agreed to allow the matter to rest for some time, suddenly changes his mind and finds it expedient to settle the matter immediately. In the same letter, the defendant in a most peremptory manner demands that the plaintiff shall send him an answer by 7. A.M. the next day, agreeing unconditionally to pay for the notarial deed which he the defendant desired, and to the insertion therein of various conditions; adding "if you don't recapitulate in your reply all that I require from you, and that, as I have already mentioned, by 7. A.M.

"to-morrow, I shall not trouble you any more on the subject, and make my own arrangements."

To this letter we are not astonished that the plaintiff replied, stating that, as the defendant chose to assume such a tone, he declined to comply with his summons and would hold him bound by his verbal agreement.

We are clear that whatever concessions the plaintiff had made between the 14th and the 29th, there is not a tittle of evidence to shew that he had consented to bear the expense of a notarial deed, unless it proved to be trifling in amount, and that, in the circumstances, the defendant was not legally entitled to impose such a condition on him. The attitude assumed by the defendant therefore in this letter was beyond doubt an unwarrantable one. The plaintiff was not obliged to comply with his demand, and his refusal to do so did not entitle the defendant to repudiate his engagement, and to enter into an agreement with another person as his subtenant.

Our examination of the evidence satisfies us that a verbal contract of lease was concluded between the plaintiff and defendant on 14th December, that nothing which subsequently passed between the parties, warranted the defendant in repudiating his engagement, and that by letting the premises to another person he had committed a breach of his contract with the plaintiff. Such being the view which we take of the evidence, let us now examine the conclusions of the plaintiff's declaration—the plaintiff asks judgment.

1st ordering the defendant to deliver to him the house and all its appurtenances, and:

2o to pay to him the sum of Rs 10 per day as damages, from the 15th day of January until execution of the said order.

In other words we are asked to order specific performance of the obligation undertaken by the defendant, to deliver the premises to the plaintiff, to find the defendant liable in damages for his failure hitherto to implement this obligation, and further to find him liable in damages at a certain rate during his failure or delay to do so. The conclusions therefore though in form cumulative, are really alternative. Throwing out of consideration for the moment, the second conclusion in so far as it relates to an order finding damages due for prejudice already sustained by the plaintiff—the defendant is to be ordered to do something

ad to pay during his failure to do so damages at a certain rate.

We are not asked to pronounce Judgment ordering specific performance *absolutely*, but merely ordering specific performance under pain of damages during continued non-compliance with the order. Now if we were in a position to estimate the prejudice, which the plaintiff will hereafter sustain by the defendant's failure to carry out his obligation to deliver the premises, we would be prepared to grant judgment in the terms craved. But can we on the evidence before us assess these future and contingent damages? We think not. The evidence affords means of estimating the prejudice already suffered by the plaintiff, but we fail to find in it reliable data upon which to estimate what prejudice he will hereafter sustain. When on the 15th *proximo*, the plaintiff ceases to occupy the house in which he now is, it may probably be within his power to find, at the same rent as he had agreed to give the defendant, accommodation equally commodious with that which the defendant agreed to supply. At all events the change of season will then have removed the main cause which led him to leave the house formerly occupied by him at Moka, and to take a house at Curepipe. In one or other of these ways, at least the main source of prejudice disclosed by the evidence, the greatly increased outlay in rent, will be modified or will have ceased. As therefore the evidence fails to show that the plaintiff will sustain future prejudice, or what prejudice if any he must suffer, we cannot, as at present advised, assess the problematical and prospective damages to which the plaintiff may hereafter become entitled, should the defendant fail to carry out his obligation towards him. But, being thus precluded from estimating the prejudice which the defendant's inability, or failure, will entail on the plaintiff—liability for damages in respect of which would, under the declaration as framed, be the consequence of failure to comply with our order requiring the defendant to put the plaintiff in possession—we are not in a position to grant an absolute order requiring the defendant to deliver possession to the plaintiff: for with such an order it may be, and *prima facie* is, impossible for the defendant to comply, he having parted with possession of the house to another tenant.

We cannot therefore grant the order craved by the plaintiff in the first conclusion of his declaration, but must confine ourselves to finding that the plaintiff has succeeded in es-

tablishing that a verbal contract of lease was concluded between him and the defendant, and that in virtue thereof he is entitled to demand to be put in possession of the premises, reserving to the plaintiff his right (should the defendant from inability or otherwise fail to hand over possession to him) to enforce his remedy in such a manner as may be competent to him. It now only remains for us to deal with the second conclusion of the declaration, in so far as it relates to damages for the prejudice already caused to the plaintiff by having been prevented from enjoying possession of the premises from 15th January to this date. On this point we have in the evidence before us ample means of assessing the damages due.

It appears that since the first of February, the pecuniary loss sustained by the plaintiff is as follows: Instead of occupying a house at a rent of Rs 90 *per* month, he has been compelled to retain his former house at Moka, in which his furniture is stored, and to keep a guardian therein, he has also been compelled to take another house at Curepipe for himself and his family. The additional monthly expense to which he is thus put is Rs 55. Making for the period between 1st February and this date, a sum approximately of Rs 150. If we add to this a further sum of Rs 150 as compensation for the annoyance and inconvenience which in various ways he has sustained, we believe that the sum so arrived at Rs 300 is a reasonable and moderate amount at which to assess the damage which the plaintiff has hitherto sustained, in consequence of the defendant's failure to put him in possession of the premises.

On the whole matter, we find that the plaintiff has succeeded in establishing the existence of a verbal contract of lease, between him and the defendant, in virtue of which he is entitled to demand of the defendant possession of the premises in question; we reserve to the plaintiff all rights competent to him, should the defendant fail or delay to execute this obligation, and we further find the defendant liable in damages to the extent of Rs 300, for the prejudice hitherto sustained by the plaintiff, in consequence of the defendant's failure to put him in possession of the premises as at 15th January last, and we also find him liable in the costs of this action.



## SUPREME COURT.

**ACTION IN DAMAGES FOR WRONGFUL SEIZURE OF GOODS IN A SHOP.—LOSS OF CREDIT.—DISTRICT COURT COSTS ALLOWED AS CASE WAS ONE THAT SHOULD HAVE BEEN DECIDED BY DISTRICT COURT.**

*The plaintiff sues the defendant in the present case in damages for the seizure of his shop under the following circumstances :*

*On 24th August 1882 the defendant sold goods to one Apping, the payment of which was guaranteed by a chinaman who was bearer of a certificate of residence in the name of Ah-Mine.*

*The account for the goods was not paid and the defendant caused certain goods in the plaintiff's shop to be provisionally seized.*

*On enquiry it was found that the account was not guaranteed by the plaintiff, and the Magistrate ordered the provisional seizure to be removed.*

*The defendant pleaded good faith.*

*Held that in the absence of evidence as to the loss incurred for stoppage of sales, legal and other expenses, the Court could not assess damages on these heads.*

*For loss of credit and moral damage done to plaintiff, the Court allow two hundred Rupees.*

*As in the opinion of the Court, this was a case that should have been brought before the District Court, the costs allowed, to be those allowed in the District Court.*

**AH-MINE—Plaintiff**

*versus*

**JAFFAR HAROON—Defendant**

**Before**

**His Honor Sir ADAM GIB ELLIS K<sup>t</sup>—Chief Judge**

**and**

**His Honor J. ROUILLARD—Acting Puisne Judge**

**V. KIVERN.—Counsel for plaintiff  
J. MERCIER—Attorney for the same**

**R. M. BROWN—Counsel for defendant  
J. D'z. de Charmoy—Attorney for the same**

**Record No. 21,755**

**23rd April 1883.**

This is an action in damages for the "unlawful and wrongful" seizure of goods in plaintiff's shop, situate at Savanne, under the following circumstances: on the 18th October last the defendant obtained from the Senior District Magistrate of Port-Louis, leave to effect a provisional seizure of goods situate in plaintiff's shop, for nonpayment of an account for goods sold to one Apping on the 24th August last, payable on the 24th September following, and purporting to be guaranteed by Ah-Mine the present plaintiff. The Magistrate after inquiry found that the account was not guaranteed by Ah-Mine, that he had never affixed his name to it, and he ordered the provisional seizure to be removed, after certain goods in the plaintiff's shop had been under seizure during 25 days.

The propriety of the magistrate's judgment from which no appeal has been made, was not questioned before us, evidence was led chiefly in support of a plea urged by the defendant in mitigation, to the effect that "he" "had acted in perfect goodfaith and in the legitimate exercise of his right as bearer of an accepted account due to him by Apping."

The evidence produced by the defendant related that, on the 24th August last, two Chinamen one of them being Apping, with whom the defendant had dealings before, came to his shop. That Apping bought goods to the amount of Rs 542.84, and signed an account which was then and there accepted by the other Chinaman, who was bearer of a certificate of residence in the name of Ah-Mine, and that this Chinaman turned out to be the owner of the shop recently purchased by Ah-Mine. According to the plaintiff's evidence, neither Ah-Mine nor even Ahwan went to defendant's shop; but Ahwan admitted having given to Apping an authority to guarantee accounts for him (Ahwan) which authority he alleges that he revoked previous to the 24th August last.

The Court has doubts whether things did

really take place as alleged by the defendant, but whether Ahwan was present in defendant's shop and gave the alleged guarantee, or whether Apping signed Ahwan's name with or without authority from the latter, the real point before the Court is whether Ah-Mine was privy to the above document, now, there is not a tittle of evidence to shew that Ah-Mine ever gave any authority to Ahwan to sign for him (Ah-mine), and there is absolutely nothing to show that the sale to Ah-Mine was anything but a *bona fide* transaction on the part of Ah-Mine.

This being the case, it follows that by seizing goods belonging to Ah-mine, the defendant has done to the latter a wrong for which compensation is legally due, (the defendant has indeed pleaded his good faith) but even if credit is given to him for this version of what took place in his shop on the 24th August last, he is shown to have acted with great imprudence. The Chief Clerk of the defendant has related to the Court, that the Chinaman who guaranted the account was known to him under the name of Ahwan, that he made an observation to him on this subject, and that on the man stating that he had taken a license under the name of Ah-mine, he was satisfied. Again the provisional seizure was effected, without the defendant taking steps to ascertain what signature had really been affixed to the document.

When determining the amount of damages due, the Court found itself in presence of a difficulty arising from the fact that the plaintiff has omitted to supply the Court with any dates in support of his claim for damages. The plaintiff indeed spoke of stoppage of trade, of legal and other expenses incurred, but has given no evidence as to the amount of his daily sales and profits, and as to the money expended by him in consequence of the seizure. In the absence of any proof, it is impossible for the Court in these items, to assess any damage, as it would be mere guess work.

On the point of loss of credit and moral damage done to the plaintiff, in his capacity of trader, there is only the evidence of plaintiff, but the damage alleged is such a natural consequence of a seizure made under the circumstances related to us, that the Court readily accepts the sole assurance of the plaintiff in that respect. As to this kind of damage, it would be impossible to expect any precise

data, and the plaintiff himself would be unable to inform the Court to what extent his credit may have suffered as a consequence of the seizure, or to appreciate the moral wrong which the act of the defendant has done to him, but that injury has been done to the plaintiff, is a fact which cannot be disputed.

Whilst assessing the damages on this head however, the Court must have regard to the commercial standing of the plaintiff, and to the extent of the trade which he was carrying on. Now, the plaintiff, being a petty chinese shopkeeper, does not belong to a class of traders to whom extensive credit is generally given; and as to the trade of plaintiff, it must have been carried on a very restricted scale, inasmuch as a few weeks before the seizure, he bought the stock in trade of Ahwan the previous owner, for the sum of Rs 282, and it has not been shown to the Court that, since his purchase, plaintiff did carry on his trade on a footing different from that of his predecessor.

Under these circumstances the amount of damages claimed, namely Rs 2000, is quite out of proportion with any injury the plaintiff may by any possibility have suffered, and the Court thinks that two hundred rupees will meet the justice of the case.

It is also the opinion of the Court, taking all the circumstances of the case into consideration, that the plaintiff would never have obtained before any Court, even half the amount claimed by him. The District Court, with its extended jurisdiction would have given the plaintiff ample redress, and the institutions of actions like the present one before the Supreme Court, can have no other result, but to increase needlessly the costs of litigation. To this mode of proceeding the Court cannot give any encouragement, and its order is that in this action, District Court costs only shall be allowed.

There shall be no caption of the body, as, by ord. 16 of 1869, the Court can only grant it in cases where the damages have arisen through the fraud or bad faith of the defendant, and the evidence produced does not lead to that conclusion

## SUPREME COURT.

**APPEAL FROM DECISION OF ADDITIONAL DISTRICT MAGISTRATE PORT LOUIS, FINDING ACCOUNTANT IN BANKRUPTCY LIABLE FOR A BILL SIGNED BY BANKRUPT.—CREDITOR MAY OBTAIN JUDGMENT BUT CANNOT ENFORCE IT AGAINST EFFECTS OR PERSON OF BANKRUPT. — ART. 9 OF ORD. 15 OF 1882.**

*This is an appeal from a decision of the Additional District Magistrate of Port Louis under which he held the accountant in bankruptcy of Assen Couty, and the endorser of a bill signed by the bankrupt, liable to the holder of the bill jointly and severally.*

*The appellants contended that the judgment was incompetent in consequence of Article 9 of Ordinance 15 of 1882 which enacts that no creditor to whom the bankrupt is indebted, in respect of any debt provable in bankruptcy, shall have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by the Ordinance.*

*It was not denied that the debt was one provable in bankruptcy.*

*Held that the creditor could obtain judgment, but that the judgment so obtained could not be enforced against the person or the effects of the bankrupt.*

*Appeal dismissed with costs.*

**HERCHENRODER now GONARD—appellant**

*versus*

**MAZAUD, MONTAUZÉ & Co—Respondents**

**Before**

**His Honor A. MUEE,—second puisne judge**  
**and**

**His Honor L. Cox,—third puisne judge.**

**V. K/VERN,—Counsel for appellant**  
**G. HERCHENRODER,—Attorney for the same**

**A. BOUCHERAT,—Counsel for Respondents**  
**P. F. LASTELLE,—Attorney for the same**

**Record No 781**

**2nd May 1883.**

This is an appeal from the additional District Magistrate of Port Louis, under which he has held the accountant in the Bankruptcy of Assen Couty liable to the respondents jointly and severally with one Assen Osman in the sum of Rs 298.90  $\frac{1}{2}$ . Upon the 1st October 1882, Assen Couty accepted an account for goods previously sold and delivered to him by A. Mazaud, Montauzé & Co, the said account being made payable on 20th January 1883, and the other defendant Assen Osman guaranteed payment of the said account at its maturity.

Between the date of acceptance and the date of maturity, Assen Couty became bankrupt, and the accountant in Bankruptcy represented his Estate. On the thirtieth January ten days after the maturity of the said account, the respondents, the plaintiff in the Court below, raised action against the appellant, accountant in the Bankruptcy, and against the guarantor Assen Osman, claiming payment from them jointly and severally of the account with costs. It was pleaded for the accountant that the action against him was incompetent in virtue of Article 9 of the Bankruptcy Ordinance, and that he should be put out of cause. The Magistrate overruled the defence and gave judgment with costs against Assen Osman, and the accountant in Bankruptcy, who has appealed. Article 9 of the Bankruptcy ordinance enacts that "where a debtor shall be adjudicated a Bankrupt, no creditor to whom the Bankrupt is indebted in respect of any debt provable in the Bankruptcy shall have any remedy against the property or person of the Bankrupt in respect of such debt except in manner directed by this ordinance."

It is not denied by the respondent that the debt here is one provable in the Bankruptcy, his argument is that the sole effect of the section is to prevent execution of the judgment against the Estate but that it does not take away the common law right of every creditor of suing and obtaining a judgment against

his debtor. It was further urged that under section 10 of the Ordinance the Accountant could move the Court of Bankruptcy to restrain the Respondent, and that as he had not done so, it was competent for the latter to proceed with his action.

Our first impression on the important question raised was that the appellants' contention was well founded. We thought that if every creditor was allowed to raise action for recovery of his debt before the ordinary Courts of law, the Estate might be charged with a large amount of costs, and the liabilities thus increased after the adjudication, and that to avoid such a result the legislature must have intended to lay down in the section under consideration, an absolute bar against such actions.

But we have come to think that practically there is little danger of individual creditors raising actions at law against the Estate, as the Court Bankruptcy has power, under article 10 of the Ordinance, to restrain such proceedings — and therefore, creditors will scarcely venture to take proceedings which may bring down an injunction upon them, the costs of which they would have to bear, — section 9 does not expressly enact that after adjudication, actions by creditors will be absolutely barred. The question is whether we can construe the provision that creditors will have "no remedy against the property &c of the "Bankrupt" as meaning that all right of action are taken away.

After careful consideration, we have come to the conclusion that the sole effect of the words is, that creditors cannot interfere with the assets of the Bankruptcy, but that there is nothing in the section to prevent them from suing and obtaining a judgment. — At the same time we think it right to point out that such a judgment would be utterly useless, for it can never be enforced against the assets or person of the Bankrupt; nor would it enable the creditors to exercise the rights which the ordinance gives, to vote for the election of the Trustee, take dividends &c. — For, to exercise those rights, the creditor must bring himself within the ordinance and prove his debt in the manner prescribed before the Trustee, who would not be bound to admit proof of the costs incurred by the creditor to obtain a useless judgment.

We have not been able to find express authority in support of the view we take of the section (which corresponds to section 12 of the

Bankruptcy act: 1869, from which our ordinance is copied) but we find that in some cases, the English Court of Bankruptcy followed a course which would be clearly incompetent, if the section had the meaning which the appellant has asked us to give to it. Thus in *ex parte Mills in re: Manning L.R. 6 Chan. App. p. 594*, when an action had been entered against two acceptors of a Bill of Exchange, after one of them had filed a petition for liquidation by arrangement, and the registrar had granted to the trustee an injunction restraining proceedings against the liquidating debtor, on appeal it was held that the order of the registrar ought to have been to allow the action to proceed, but only to restrain the plaintiff from enforcing his judgment against the property or person of the insolvent acceptors, and the registrar's order was altered accordingly. On the other hand no authority could be found by us to the effect that the section operates as a bar to an action by a creditor for a probable debt. But there are many authorities dealing with that section of the English Bankruptcy statute which corresponds to Article 10 of our Ordinance, and which prove to our minds that it is customary in England, when an Estate becomes bankrupt, as soon as a creditor raises proceedings in an ordinary Court of law, or even after proceedings have been raised, for the Trustee to apply at once for an injunction restraining these proceedings, which the Judge in Bankruptcy will grant or refuse in his discretion. We think it right to state that action under the 10th article appears to be the immediate duty both of the official assignee and trustee of every Bankrupt Estate. We are accordingly of opinion that the magistrate's decision is right, and that the appeal should be dismissed with costs.

## SUPREME COURT.

APPEAL FROM DECISION OF STIPENDIARY MAGISTRATE.—SOLEMN AFFIRMATION AS A HINDOO OR MUSSELMAN.

*This is an appeal from a decision of a Stipendiary Magistrate in a case in which two laborers had laid an information against a manager of an estate, for cruelty to them; they made their statement on solemn affirmation, and at the date of the trial, witnesses were examined on both sides. The Magistrate preferred the evidence of the*

*one side and convicted the manager of the estate, Mr de Mazérieux, who appealed against the conviction.*

*Two grounds of appeal were started; the principal one of which was that one witness is simply said in the record to have been solemnly affirmed, without it being added whether he was affirmed as a Hindoo or a Musselman.*

*Held that the judgment cannot be maintained. Conviction quashed accordingly.*

—  
Before

His Honor A. MURE,—Second Puisne Judge.

*His Honor L. Cox* and

His Honor J. ROUILLARD,—Acting Puisne Judge.

—  
DE, MAZÉRIEUX,—Appellant.

*versus*

QUEEN,—Respondent.

—  
E. GALLET,—Counsel for appellant.  
A. J. COLIN,—Attorney for the same.

J. M. GIBSON, Substitute Procureur General,—Counsel for Respondent  
J GUIBERT—Attorney for the same.

—  
Record No. 16.

—  
JUDGMENT OF HIS HONOR A. MURE.

—  
10th May 1883.

This is an appeal from a decision of a Stipendiary Magistrate in a case in which two laborers had laid an information against the manager of an Estate for cruelty to them, they made their statement on solemn affirmation,

and at the date of the trial, witnesses were examined on both sides. The magistrate preferred the evidence of the one side and convicted the manager of the Estate, Mr Mazérieux who has appealed to us against the conviction. Two grounds of appeal have been started, and one of them is undoubtedly of very great importance, it is that while the other witnesses who were Hindoos, were stated to be solemnly affirmed as Hindoos there is one witness, Kismet, who is simply said in the record to have been solemnly affirmed. In this appeal it was strongly urged that the fact that it was merely stated that Kismet was solemnly affirmed, and that it had been omitted to state whether he was a Hindoo or a Musulman vitiated this conviction, and that we were bound to quash it. I confess I listened to the argument with great interest on both sides. It was very strongly urged for the Crown that there is a presumption here of the regularity of the Judge's proceedings, that the Ordinance under which the Magistrate acted, did not require him to record the fact that this person was a Mahometan or a Hindu, but simply required him to ascertain the fact that he was a religionist of one or other of these persuasions, and that as he had done that, he was entitled to affirm him, and that therefore the words "solemnly affirmed" which were put into the record were enough to satisfy the requirements of the statute. Reference was also made by the Crown to the English Statute, which undoubtedly are very different from the Ordinance which is now in force in Mauritius. In them the witness who is entitled to be relieved from the taking of the oath, has two duties to perform in order to obtain that privilege, in the first place he has, under the statute, to satisfy the mind of the judge that he is one of the persons who are entitled to make solemn affirmation, and in order to do that he severally signs a declaration of his faith, which is put up with the Record and becomes part of the proceedings. Then in the second place the affirmation which such a person makes, is of a totally different nature to the affirmation which the persons take in Mauritius. To take one instance—under the Common Law Procedure act, under which the consciences of all tender religionists were relieved, the persons begin his affirmation by saying "I, A. B., do solemnly sincerely and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and I do solemnly sincerely and truly affirm and declare that I will speak the truth, the whole truth, and nothing but the truth."

We have a totally different legislation in Mauritius. The Ordinance is wholly silent in reference to these two points. The argument of the Crown was, in the first place, that the Magistrate must be assumed to have ascertained that this is one of the persons who were entitled to be affirmed, that is to say that he was either a hindoo or a musulman, and that having ascertained that fact, he affirmed him, and that the law was sufficiently fulfilled by putting the words "solemnly affirmed" in the record. This argument seemed to me to be very strong indeed when I heard it first. However it takes for granted, and is based on the assumption, that every thing is done regularly in an inferior Court. No doubt as it has been said by a very eminent Judge, Lord Holt, when inferior jurisdictions were first established, that if a power were given to an inferior Magistrate, the proper exercise of that power would be presumed by the superior Court, but then we have Lord Ellenborough's equally famous assertion, that in dealing with the proceedings of inferior Magistrates, nothing would be presumed in favor of the conviction, and nothing would be presumed against it.

If in Mauritius a conviction on this matter had to be drawn up by a District Magistrate, it would undoubtedly form part of the conviction, that the witnesses were heard, that they were examined on oath, or that they were solemnly affirmed; and the Magistrate following the ordinary custom, would undoubtedly have added that they were solemnly affirmed as Hindoos or as Mussulmans. It seems to me that according to the form of proceeding that we have at present existing in this Island, it may be truly said that the matter we have here at issue, is a matter which comes under the theory of Lord Ellenborough, that the mode in which the evidence is taken is entered in the Record, and the entry of that in the Record, would form part of the conviction in this Colony; and therefore it comes under the principle which Lord Ellenborough laid down. That being so, the argument of the crown does not come to be so strong as it seemed at first sight. I was equally impressed with the argument for the appellant here, which went on this fact, that this was an exceptional piece of legislation, that prior to it, the oath was required to be administered to all witnesses, that this exception had been, by a long series of decisions, required to be stated in a special mode upon the record.

These decisions are those of Runglall in 1861 by the late Chief Justice of this Colony, and of Agamamode in 1862 by Mr. Justice Bestel,

and a final decision of the Supreme Court in 1875 in the case of Rajah Carrim Baccus, in which, though there is no direct decision, yet the Supreme Court distinctly recognised the principle that it is all important that the words "solemnly affirmed as a hindoo" or "as a Musulman", should appear on the record.

Now following on these decisions, it has been represented to us that the insertion of the words in question has been an invariable practice in all the Courts of the Colony, in short, a fixed jurisprudence for the last 20 years, and I understand it is so—and I have felt that however strong the argument of the Crown was on this matter, it would be going further than I ought to go, to hold that the question was open, and could be now reopened in this Court. I think it ought not to be allowed by the Court to be reopened: there has been an unvarying set of decisions, there has been an unvarying practice following upon them, and it seems to me that a certain looseness might be introduced if we were to relax that order and regularity which has been hitherto taken.

For these reasons I have come to the conclusion that this judgment cannot be maintained. It is unnecessary for me to express my opinion upon the other part of the case that was argued to us, but I think it is our duty to follow the course of decisions, and to settle jurisprudence which has followed on those decisions, and that as this record is defective the conviction must be quashed.

#### JUDGMENT OF HIS HONOR L. COX

10th May 1883.

I am of the same opinion. The question of law which is raised by the appellant as to whether the omission to state whether one of the witnesses heard on solemn affirmation, was a Hindoo a Mahometan, is one which I think must be taken to be concluded by authority. It is plain that this question has been decided in the sense taken by the appellant by several judges of this Court, and I think it cannot be doubted also that there has been a considerable course of practice following on those decisions. It has been my lot to see many records of cases tried before District Magistrates, and I have never noticed that when

an Indian witness was heard, the Magistrate omitted to record that witness was either a Hindoo or a Musulman; and even before this Court, I think I may say it has always been the rule that has been followed. That being the case, we have not only the decisions of this Court, but we have the course of practice which has been followed. Under the circumstances I think we are not at liberty to reopen and reconsider the question, but must hold in accordance with the previous judgments that have been quoted, that the omission to mention whether this witness Kismet was heard as a hindoo or was heard as a muselman, whether he was one of the persons competent to make a solemn affirmation, is one which vitiates the proceedings. I must also notice that under our article 278 of the Labor Laws, it is laid down that "no judgment or order or other proceeding of any Stipendiary Magistrate shall be quashed or annulled for want of form, or be impeached or affected by reason of any mistake, defect, error or omission in the same; provided such judgment order or other proceeding be in substance and effect in conformity with or according to the true intent and meaning of this ordinance."—This article I think cannot prevent us from arriving at the conclusion that this conviction is bad, because the defect here is one of substance which cannot be remedied by amendment.

#### JUDGMENT OF HIS HONOR J. ROUILLARD

10th May 1883.

I have listened with great attention to the arguments of both parties on the delicate point brought to our consideration. It seems, at first sight, rather hard that proceedings before a Court of summary jurisdiction, although otherwise apparently regular, should be set aside because of an omission to state whether a witness who on the record is stated to have been solemnly affirmed, was a Hindoo or a Musulman;—after careful consideration however I do not think that the jurisprudence of the Supreme Court in the matter, which is settled not only by several decisions of the Supreme Court sitting in appeal on judgments of inferior Courts, but by a judgment of the Supreme Court itself in a matter of certiorari, should be disturbed.

The substitution of the solemn affirmation

for the oath being an exception to the ordinary conditions under which witnesses have to give evidence, it follows as a matter of course that when a witness falls within the exception, mention must be made in the record of the circumstances which have allowed his evidence to be taken in a special form. The argument was pressed on us that the Magistrate must be presumed to have done his duty, and to have taken the solemn affirmation of the witness, because he was either a Hindoo or a Musulman. But although this is probable, it is not absolutely certain. Here, we have a statement that a witness was heard on his solemn affirmation, but why he was so heard is not shewn—and the Court cannot go beyond the record.

For what we know, the magistrate might have accepted the affirmation of the witness, amongst other possible instances, because of the religious principles of the man, who may have been neither a hindoo nor a Mahometan, but who may have objected to taking an oath; according to the law of the Colony this would be illegal. It must be born in mind that Stipendiary Courts are Courts of summary jurisdiction, and the superior Court, although it will presume nothing against the proceedings of those Courts, will not presume any thing in their favor.

I therefore concur in the opinion expressed by my learned brethren, that the judgment of the Stipendiary Magistrate must be set aside.

#### SUPREME COURT.

APPEAL FROM A DECISION OF DISTRICT MAGISTRATE, CIVIL SIDE.—DAMAGES.—ORAL EVIDENCE TO PROVE A LEASE.

*The appellant and respondent were joint lessees of a portion of land at Pamph-mousses. In August 1882 the former turned the latter out of the land, and prevented certain persons to whom the respondent had sold his canes and cane tops, from removing them. The matter was brought before the District Magistrate who gave judgment in favor of the respondent, condemning the appellant to pay Rs 175 as damages.*

*Against this decision the present appeal is made.*

*Held that no reason had been made out for questioning the Magistrate's decision. Appeal dismissed with costs.*

*In addition to the grounds of the appeal, objections were made to the judgment on certain technical grounds :*

10. *That the Magistrate allowed the plaintiff (i.e. the respondent) to adduce oral evidence to prove a lease, but at the trial not only was no objection taken to oral evidence, but the defendant himself admitted that such a lease was made, adding however that it was subsequently cancelled ;*

*Held that the appellant had no cause of complaint.*

20. *That the plaintiff objected to oral evidence of a lease alleged to have been made to defendant by Sinatambou the son.*

*Held that the plaintiff was justified in objecting to oral proof, as he did not acknowledge the second lease.*

30. *The appellant complained of the Magistrate's having allowed the production of two records of actions brought by the defendant in the Court below, against the plaintiff and his concubine, for rent of the same plot of ground, which actions were dismissed ; but it appears that in his cross-examination the defendants admitted that he brought those actions, and stated the results.*

40. *It was contended that as the plaintiff had sold his canes to a third party, the purchaser alone had a right to sue, but, as according the evidence, he had not yet been paid, and as undoubtedly the plaintiff could not be paid until delivery was made, held that action was quite competent.*

#### IN RE

GOKOOL,—Appellant

versus

HUSSIN KHAN,—Respondent

Before

His Honor Sir A.G. ELLIS, Kt. — Chief Judge  
and

His Honor J. ROUILLARD — Acting Puisne Judge

H. GALÉA,—Counsel for Appellant  
L. WOHRNITZ,—Attorney for the same

B. COLIN,—Counsel for Respondent  
J. MERCIER,—Attorney for the same

Record No. 783.

17th May 1883.

This is an appeal from a judgment of the District Magistrate of Pamplemousses, condemning Gokool, the appellant, to pay to Hussin Khan, the respondent, Rs. 175 as damages under the following circumstances :

The respondent, who was plaintiff in the Court below alleged that he was co-lessee, jointly with the appellant, of a plot of ground held from one Sinnatambou for a period of five years, expiring on the 1st October next. The plaintiff further alleged that some time in August last year, he was turned out of the above plot of ground by his co-lessee, who also prevented certain persons, to whom he had sold his canes and cane tops, from removing them. The District Magistrate having found for the plaintiff in the Court below and condemned the defendant to pay Rs 175 as damages, the present appeal was made.

It was contended in the first place by the learned counsel for the appellant that the judgment of the District Magistrate was contrary to the evidence produced, both as to the fact of the plaintiff having been forcibly turned out by the defendant, and as to the amount at which damages were assessed. On referring to the record of the case, we find that much contradictory evidence was produced, but we find no reason for questioning the soundness of the Magistrate's decision, founded on his appreciation of evidence which he had the advantage of hearing. Nor do we think the damages excessive, it being proved that the plaintiff was turned out of the plot of ground on which he had the right to remain for a period of more than a year, and that he was prevented from disposing of portions of his crops.

In addition to the above grounds of appeal, objections were made to the judgment on certain technical grounds, which require to be disposed of.

One of the grounds of appeal is that the District Magistrate allowed the plaintiff to



adduce oral evidence to prove a lease. But at the trial, not only was no objection taken to oral evidence, but the defendant himself admitted that such a lease was made, adding however that it was subsequently cancelled. The appellant has therefore no cause of complaint.

Another ground was that the plaintiff objected to oral evidence of a lease alleged to have been made to defendant by Sinatambou the son. But as the plaintiff did not acknowledge the second lease, he was obviously justified in objecting to oral proof.

The appellant also found fault with the District Magistrate for having allowed the production of two records of action, brought by the defendant in the Court below against the plaintiff and his concubine for rent of the same plot of ground, which actions were dismissed; but it appears that in his cross examination the defendant admitted that he brought these actions and stated the results.

It was also contended that as the plaintiff had sold his canes to a third party, the purchaser alone had the right to sue. But as, according to the evidence given by the plaintiff in the Court below, (which we assume, was believed by the Magistrate) he had not yet been paid, and, as undoubtedly the plaintiff could not get paid until delivery was made, the action was quite competent.

The other grounds of appeal being of little or no importance were not insisted on.

The Court in consequence dismisses the appeal with costs.

### SUPREME COURT

**ACTION FOR DAMAGES FOR WRONGFUL ARREST, AND ILLEGAL DETENTION UPON A CHARGE OF DESERTION, BY AN INDIAN LABORER AGAINST HIS EMPLOYER.**

*This is an action in which the plaintiff claims damages from the defendant, for an alleged malicious complaint filed by his attorney against the plaintiff, under which he was wrongfully arrested and illegally detained in custody from 30th November to 6th December last.*

*On the 15th November, the plaintiff who was a laborer under written contract of service on the defendant's estate, received from defendant's sub-accountant a certificate of discharge cancelling his engagement.*

*On the 29th November, the defendant filed information against the plaintiff, charging him with having deserted from his estate and obtained a warrant upon which the plaintiff was arrested, and taken to the Police Station, where he was detained until the 6th December. On the 20th December the complaint was disposed of by the Magistrate, the charge being dismissed on technical ground.*

*Held that the plaintiff had established his right to damages, which are assessed at Rs 140.*

*In addition to these damages, the Court allowed Rs 60 in connection with the plaintiff's defence against the charge of desertion.*

*Judgment granting, in plaintiff's favor, damages to the extent of Rs 200 and costs of this action.*

LUTCHMANEN—Plaintiff

versus

WILLIAM HEWETSON—Defendant

Before

His Honor Sir A. G. ELLIS, Kt.,—Chief Judge

and

His Honor J. ROUILLARD,—Actg. Puisne Judge

H. GALÉA,—Of Counsel for Plaintiff  
W. LEBLANC,—Attorney for the same

H. HEWETSON,—Of Counsel for Defendant  
W. HEWETSON,—Attorney for himself

Record No. 21,898.

•17th May 1883.

This is an action in which the plaintiff claims damages from the defendant, for an alleged malicious complaint filed by him against the plaintiff, under which he was wrongfully arrested and illegally detained in custody, from 30th November to 6th December last.

Prior to the 15th November last, the plaintiff was a labourer employed under written contract of service on the defendant's Estate. On 15th November last the defendant's sub-accountant, who held a written power of attorney from the defendant, authorizing him *inter alia* "for him and in his name and stead to sign all contracts of service to be made with any servant or servants, and undertake in his name and stead all that may be necessary and requisite for and on account of Contracts of Service," signed a certificate of discharge in favor of the plaintiff, in the form prescribed by schedule No. 21 of Ordinance 12 of 1878, cancelling his engagement with the defendant. Thereafter on the 29th November, the defendant filed an information against the plaintiff, charging him with having deserted from his Estate, and obtained a warrant under which, on the following day, he caused him to be arrested, taken to the Police station, and there detained until the 6th of December. Subsequently on the 20th of December, the complaint was disposed of by the Magistrate, the charge being dismissed on a technical ground. These facts, which are established by the evidence before us, certainly raise a *prima facie* case of procedure so utterly unjustifiable and reckless as to amount (unless unsufficiently explained by the defendant) to malicious proceedings, entitling the plaintiff to claim damages against the defendant.

The burden of proof having thus been shifted on to the defendant's shoulders, let us see what defence he makes to the action, and how he seeks to justify his acts. The defendant's first contention is that plaintiff is still under contract of service to him, and is unlawfully absent from his Estate. This plea raises the question of the validity of the certificate of discharge granted by the defendant's sub-accountant. The main clauses of the power of attorney under which the sub-accountant acted in granting the certificate have been quoted above. If we had now to determine, whether in law a power of attorney in these terms, authorize the attorney to grant certificates of discharge, the question

might be one of some delicacy. But, on the evidence before us, we cannot hesitate as to the conclusion to be come to. We have in it evidence, that powers so worded are generally construed as implying power to cancel contracts of servants, and further that, at least on one occasion, the sub-accountant acting under the express instructions of the manager of the Estate, cancelled a contract in virtue of the authority vested in him under this power—a fact which was entered in a book kept for the purpose of inserting notes for the defendant's information. We must presume therefore that this act came to the defendant's knowledge, and not having been repudiated, was tacitly approved by him. In these circumstances we think that he cannot now be heard to plead that this discharge was an act outwith the powers conferred on his sub-accountant by the mandate entrusted to him, and that this ground of defence must be rejected. The defendant's next contention is that the cancellation of the plaintiff's contract was obtained fraudulently and unlawfully, without defendant's knowledge, and is null to all intents and purposes. The plaintiff led evidence, for the purpose of showing that the order to cancel his engagement was given by the defendant himself to his sub-accountant. In support of this allegation, we have the express deposition of the plaintiff and of the defendant's sub-accountant, to which the defendant opposes his own oath. Unfortunately for him, the defendant did not, in the cross examination of the plaintiff and his witness, examine them in detail on this point, but contented himself with simply opposing his own oath to theirs. It does not seem by any means impossible, that a fact of such very small real importance as that of authorising the cancellation of the contract of one of the many laborers employed on his Estate, may have escaped the defendant's memory. At any rate, on the conflicting evidence before us, we are not prepared to hold that plaintiff's allegation is proved to be false. On the evidence it does not appear to be necessary for us to go further, or to find that the plaintiff has substantiated his allegation.

The defendant further, in support of the plea now under consideration, alleges that the certificate was fraudulently granted. Now we have not here to consider whether the sub-accountant in granting the certificate, acted in accordance with his duty to the defendant. Even assuming however, that in granting the certificate, the sub-accountant did not act for the best interests of his employer, we do not think that the facts before us establish, that

in obtaining the certificate any fraud whatever, was practised by the plaintiff. It is shown that for a day or two after the date of the certificate, the plaintiff was inserted in the Estate books as absent from work, but on the 20th the fact that the sub-accountant had stated in answer to an inquiry that he had granted a certificate of cancellation in favor of the plaintiff, was brought to defendant's knowledge. In the possession of this information, we cannot but regard the institution of the complaint against the plaintiff, as a most rash and reckless proceeding on the part of the defendant. Further, the evidence shows that when, on the 30th, the plaintiff was by the defendant's order brought before him, he the plaintiff, at once tendered the defendant his certificate, saying that he had his papers in order, and was free from his engagement. The defendant refused to look at the document tendered to him by the plaintiff, and ordered him to be conveyed to the Police Station. Thither the defendant followed him shortly afterwards, and the officer in charge of the station at once showed him the certificate of discharge. On seeing this certificate and recognising, as he must have done, the signature of a person, who, at its date, was his sub-accountant, and held a power of attorney under which he had previously been allowed without question to cancel at least one engagement, we would have expected that the defendant would have paused, and even if he desired to question the validity of the document, would have recognised, as a lawyer, that one holding such a *prima facie* valid discharge, duly initialed by the Magistrate, could not be regarded and treated as a deserter within the meaning of the Labor Law. The defendant however persisted in his course, and allowed the plaintiff to continue in custody until the 6th of December. Such conduct we cannot regard as otherwise than utterly rash and reckless, as constituting implied malice, and as rendering the defendant liable for the prejudice sustained by the plaintiff from the course which he had adopted and now persisted in.

We think therefore that the plaintiff has established his right to damages. Though the plaintiff occupies a humble station in life, we cannot regard the loss of liberty for seven days, as other than a serious injury, for which substantial damages are due. We think these may be reasonably assessed at Rs 140. In addition to this, there were, the plaintiff states and we are quite prepared to believe him, considerable expenses incurred by him in connection with his defence against the

charge of desertion, which were by no means covered by the taxed costs, to which the Magistrate found him entitled in dismissing the complaint. The balance of such costs, and other expenses incident to his defence, we think may be estimated at Rs 60.

We accordingly grant judgment in his favour, and find him entitled to damages to the extent of Rs 200, and to the costs of this action.

## SUPREME COURT

APPEAL AGAINST JUDGMENT OF THE MASTER  
—BANKRUPTCY.—BANKRUPT HEARD WHO  
WAS NEITHER SWORN NOR AFFIRMED.—ARTICLE 158 OF ORDINANCE 38 OF 1853.

*This is an appeal by four merchants, who are resident in India, against a judgment of the Master, on a question of arrangement, which was proposed by an insolvent debtor, Adam Hajee Essack.*

*The following points were taken :*

10. *that the insolvent debtor was examined before the Master without being either sworn or solemnly affirmed.*

*Held that an irregularity was committed, but as the irregularity was done with the knowledge of Appellant's Counsel, the objection cannot be sustained.*

20. *That the Bankrupt had no capital and that his capital is fictitious. The Bankrupt got advances from his father, both in money and goods. Held this was not fictitious capital.*

30. *That the Bankrupt's books had not been regularly kept.*

*Held that they were sufficient.*

40. *That the affidavit made by the Bankrupt is incorrect, because he did not make a full disclosure of his effects, inasmuch as he failed properly to record a transaction about sugar in India.*

*This matter at the date of the Affidavit was incomplete, the Bankrupt entered in his de-*

*claration a sum of profit he estimated, from the Bills of Lading, the transaction would result in.*

*Held that he did not knowingly intend to deceive his creditors.*

50. On the 17th September, letters were received in this place, containing news of the failure of the Calcutta House and the Bombay Houses, which were represented in Mauritius by the father of the Bankrupt; and it is said, this involved the failure of the father and of the Bankrupt. Upon the day after, he borrowed Rs. 2,800, of which he repaid Rs. 1,960 the next day. The loan was made for the express of enabling the son to make a payment into the Bank, on condition that it should be returned the next day.

*Held that this is not sufficient to overturn the arrangement of Bankruptcy.*

60. At the 2nd meeting of the Creditors of the Bankrupt, a debt to the Commercial Bank was proved for a sum of Rs. 29,000 odd. The meeting was postponed to 18th December, when the Bank appeared by its attorney and objected to the arrangement, and after a little consideration an adjournment for half an hour was asked for, negotiation of some kind took place out of Court and the same Attorney went into Court at the end of the half hour saying that the Commercial Bank had transferred its account to Hajee Amode, he proved the same in favor of the latter, produced it and voted in favor of the arrangement.

*Held that there was nothing to show that the Bankrupt was aware that this transaction was made on his behalf. There is no attempt to prove fraud, or connivance of his, there is no proof that the creditors will be injured by the arrangement or that they will be affected by it.*

*Appeal dismissed with costs.*

PURTHA & Co.—Appellants

versus

ESSACK—Respondent

Before

His Honor A. MURE,—Second Puisne Judge

and

His Honor L. Cox,—Third Puisne Judge.

W. NEWTON,—Of Counsel for plaintiff  
F. ROBERT —attorney for the same

L. ROUILLARD,—Of Counsel for Respondent  
A. J. COLIN,—Attorney for the same.

Record No. 21,893

*Judgment on the merit of the case.*

JUDGMENT OF HIS HONOR A. MURE

21st May 1883.

This is an appeal by four merchants, who are resident in India, against a judgment of the Master of the Court, on a question of an arrangement which was proposed by an insolvent debtor of the name of Adam Hajee Essack.

The first point which the appellants take is an objection to the legality of the procedure, which is said to be irregular and against law, inasmuch as Adam Hajee Essack was examined before the Master without having been either sworn or solemnly affirmed. It is said that the 158th article in the first place directs the Commissioner in Bankruptcy, if an enquiry take place at the first sitting, to examine upon oath such petitioner or any witness produced by him; and in the 168th section, under which the procedure took place in this enquiry, and under which any opposition to the arrangement on the ground that it was not *bona fide* and not reasonable must be entertained by the Court,—the article of the ordinance directs that the Court shall have power at any time on the application of any creditor, to appoint a private sitting for the purpose of such enquiry, and may summon before it such petitioning creditor, or any creditor, and examine him upon oath.

It does seem undoubtedly that an irregularity was committed in the proceedings of the lower Court, but the proceedings themselves have to be very carefully looked at, to see how that irregularity arose; several meetings had taken place, both a first private meeting and a second private meeting, and several adjournments of the second private meeting had taken place at the instance of creditors of the Estate, (and I shall have to refer to these in a subsequent part of my judgment) and finally there came to be the requisite majority in number and value of the creditors voting for the arrangement. What took place was this. Purtha and the other three opposing creditors, by their Counsel, objected to the arrangement and asked for a proof.

The minutes of the proceedings in the lower Court, do not tell what the grounds of proof were to be, or what the nature of the proof allowed to the objecting parties was. I cannot approve of the mode in which these minutes were kept, for there are a great many hiatus in them, and a great deal of procedure, which I think ought to have been a little more definitely stated; but what took place is what I have said, and while the minutes themselves do not shew the grounds on which the opposing creditors asked for the proof, the judgment of the Master clearly shews what these grounds were. He says that after the vote approving of this arrangement had been come to by a majority, the objecting creditors insisted on a proof on the ground of fraud, that they were able to prove fraud in the method in which this arrangement had been come to by the majority of the creditors. Now that was the nature of the proof which they undertook, and, accordingly the Master allowed them a proof. The procedure is very necessary to be observed, the counsel who represents these creditors called on the first day three witnesses, among other Mr. Le Maire, the secretary of the Commercial Bank, Mr. Huteau a merchant in this place and another gentleman. On the second day, the counsel for the objecting creditors who are now the appellants, called the petitioner—let it be marked that that person was called by the appellants themselves, and the record intentionally bears that he was not affirmed.

Now the first ground the petitioners take here, is that this irregularity is sufficient in law, and ought, in law, to upset the whole arrangement. Undoubtedly this person ought to have been solemnly affirmed, and the question

is, is it the fault of the judge, or, is it the fault of the counsel that he was not affirmed?

I rather think that the blame lies with both parties, it may be the duty of the judge to see that a witness is properly sworn or affirmed as soon as he enters the witness box, it is certainly also the duty of the counsel not to begin this examination until the usual formality has been observed,—it is an irregularity which has occurred in Courts of justice before, and will occur—; It may be that the examining counsel took for granted that this person had made a declaration in the terms of the ordinance, as in cases of bankruptcy, and that any other mode of securing his speaking the truth was unnecessary; or perhaps he supposed that it would be right, as this was a question of fraud, that he should merely make a statement, as it were on personal answers, and not be examined on oath.—But whatever is the cause of this, it was done, it took place, and the entry in the record of the words “not affirmed”, shows that it was done perhaps at the suggestion, certainly with the knowledge of the appellants’ counsel.—There was much procedure in the case thereafter, and the case went on without objection upon this ground, to the very termination of the proceedings in the inferior Court; but then an appeal is taken in this Court, and the first ground that the appellants took, is that which I have now stated.—Upon considering the matter I am unable to sustain this ground of appeal. I think it is not in the mouth of the appellants to take it; they themselves were parties to the irregularity; it was in examining a witness by themselves that it occurred, and that being so, and the whole case having gone on for weeks, and even months after it took place, without any notice being taken of it by them, and all parties having acted as if the proceedings had been perfectly regular, it seems to me that it would not be at all right to sustain this objection here.

This matter has occurred before in the jurisprudence of this Court, in the case of *Boulinsau vs. Couve* (1876 page 118), in the Court below a witness had been examined without having been sworn or solemnly affirmed, and the Court of appeal refused to sustain the objections. Then we have such a dictum as that which is given by Taylor, Section 1380 7th Edition in his *Law on Evidence*, in which he says “On a trial in Ireland where the Lord Lieutenant was called as a witness, an attestation on honor instead of an oath, was by mistake administered to him, and he was then examined

“ and cross examined, without any objection  
 “ being taken to the reception of his evidence.  
 “ Subsequently a motion for a new trial was  
 “ made, on the ground that the testimony of  
 “ an unsworn witness had been received,  
 “ but the Court, having ascertained that the  
 “ losing party had, from the first, been aware  
 “ of the irregularity, very properly held that  
 “ his objection came too late and the rule  
 “ was consequently discharged.”

I think the same principle applies here, these parties were undoubtedly aware of what had taken place, they knew how this person was giving his testimony and I think their contention ought not to be supported by the Court.

Then there are other and numerous grounds upon which this question was pleaded to us, and the Master has pronounced a judgment in this case of very considerable length, in which he has taken up these grounds separately, and which I have very carefully considered. The first point on which reliance is placed to upset this arrangement, is that this Bankrupt had no capital; and, further, it is said that his capital is a fictitious capital. Now the question is, what is fictitious capital?

Fictitious is that which is not real, that which has no existence, but this bankrupt admits himself that he had no capital when he began, but he got advances from his father, both in money and in goods to a very considerable extent. Now I do not know that that can be called fictitious capital. I think it cannot be so called. He got the advances it is true without interest, but still I think it quite a fair remark, which the Master makes, that most young men, have to depend on their friends for the means of beginning business, I do not think it can be said that that is fictitious capital.

The next ground that was taken was that the books of the Bankrupt had not been regularly kept. No doubt the Bankrupt's books are not kept with that precision and accuracy, which we would expect to find in books well kept. All the transactions were not ledgerised when this petition for an arrangement took place, but there are records of most of the things objected to, in one or other of his books, or in documents which are produced here, and I think it is not enough to say that there is irregularity, because the books have not been brought up to date. The most important case is that of a sale to the “*Magasin général des Grains*”, but no loss had occurred

to the Estate in consequence of that, for the account was known to exist, and has been paid to the official assignee himself.

Then there are sales to chinamen; their names and the dates of the sales not being entered in the books, but the answer to that is that the transactions themselves are entered, and they form the subject of accepted accounts—Now if the accounts were accepted, and if they were sent into the market (they were actually sold in a sense—they were transferred to a third party) it is impossible to say there was no record of these transactions. The transactions were recorded in one way or other, and when the matter of this Bankruptcy comes into Court, it is seen that these transactions have taken place. It cannot be said that so far as that is concerned, there is the fraud proved which these appellants undertook to prove.

Again, it is said that the affidavit is incorrect which this person made, because he did not make a full disclosure of his effects; and the proof that is given of that is, that “there was a transaction about sugar in India which was not properly recorded in this affidavit;” but the answer to that (and I think it is in the Master's judgment) is that this transaction was at the date of the affidavit incomplete; he did not know whether it was to be entered as a success or a failure, and he put into the affidavit the sum of profit which he estimated from the bills of lading the transaction itself would result in—No doubt he was mistaken, but this is not a matter in which it can be said he knowingly intended to deceive his creditors—Then there is another matter which has to be noticed. It appears that on the 17th September, letters arrived in this place containing news of the failure of the Calcutta house, and the Bombay houses, which houses were represented in Mauritius by the father of the Bankrupt, and it is said that that involved the failure of the father, and of the Bankrupt. Upon the day after, he borrowed from his father a sum of Rs 2,800, and on the next day he paid to his father the sum of Rs 1960. Now both of these persons swear distinctly to the nature of this transaction; the father swears that he only gave his son the money for a single day, on the condition that it should be returned the next day and, on the next day the son paid part of it, his estate being benefited to the extent of Rs 840. I confess that this matter does seem somewhat suspicious; but, is it sufficient to overturn this arrangement? The loan was made for the express purpose of

enabling the son to make a payment into Bank, and on the condition that it should be returned the next day, and I must say I think that such a loan, if the condition be clearly proved, as I think it is here, does not fall under any of the objections that can be made to a transaction of that kind, it was the duty of both parties to keep faith, and it was the duty of the son to return the sum.

But the most grave matter to my mind remains still to be stated. It is a transaction in which the Commercial Bank of this place largely figures. The petition for the arrangement was presented on the 25th September, and the Master fixed the 6th of November for the first private meeting under which the whole matter was to be considered. On that day a majority of those who had proved, voted for the proposed arrangement vizt: that the Bankrupt should pay 25 per cent of his debts in cash, and that that payment be guaranteed by two persons here, who were accepted and against whom no objection is made, Hajee Ayoob and Zachariah. The second meeting was fixed on the 27th November, on that day in place of the parties proceeding to deliberate who had previously accepted this arrangement, a great number of new debts were proved; among others a debt to the Commercial Bank for a sum of Rs 29,000 odd, and these claims are put in; and at the instance of the Commercial Bank, an adjournment takes place, and the Bank seems to have been in great doubt as to what procedure they should take in this matter. The adjournment was to the 18th of December, and on that day occurred that to my mind, which forms the most difficult matter in the case, and the one which I have considered with the most care. The Commercial Bank appeared and by its attorney objected to this arrangement and after a little consideration an adjournment for half an hour was asked for. Negotiation of some kind or other takes place out of Court, and the same attorney goes into Court at the end of the half hour, and saying the Commercial Bank has transferred its account to Hajee Amode, he proves the same claim in favor of the latter, produces it and gives the assignee's vote in favor of the arrangement. Now I must confess that that proceeding struck my mind at first as of a very suspicious character indeed. If this party, Hajee Amode, had been proved to be the Agent of the Bankrupt in inducing the Bank to sell for 35 per cent to him, a debt for which they would not accept 25 per cent, if it had been even *prima facie* proved that the Bankrupt had been a party to that transaction, and that Hajee Amode had acted at the ins-

tance of the Bankrupt, or with funds provided by him, I certainly should not have held that arrangement could stand, either as a *bond-fide* or a reasonable arrangement. If the Bankrupt had been shewn to be a party to that arrangement, there would have been a great deal to say in favor of the objections of the appellants being proved.

I have read the proof very carefully, and there is not a single question put to the Bankrupt to bring out the fact that he was aware that this transaction was made on his behalf. There is no attempt to prove fraud of any kind or to prove his connivance at this transaction. In that state of the matter, I confess I cannot take the fact of fraud having taken place as proved. I think that fraud must be proved, and as there is no attempt even at proof, or his participation in this assignment, it cannot be presumed that it was fraudulently contrived.

I do not see how I can take it for granted that the Bankrupt was a party to this, and that he was the moving agent in it, and that he has by, providing the funds for this additional 10 per cent, secured the majority of his creditors. No doubt there is much suspicion on various parts of this transaction, it is a very difficult question which the Court has to consider; and in a doubtful matter, the scale has been turned in favor of the arrangement by the following consideration.

This Estate is undoubtedly insolvent, and we have to consider that when an Estate is insolvent the true question is how shall you best realise the assets and pay over fairly and equitably among the creditors, the sum which is realised, so that, they shall each get their share of the Estate, which is incapable of paying claims in full. That is the true question to be raised in every Bankrupt Estate, and if this arrangement is one—and it was not said to be otherwise—that would give as large a percentage to creditors as they would get from the Estate, if it were made Bankrupt, I am of opinion, it is one which the Court in the circumstances ought to confirm, that it is one that the creditors cannot do better than accept; the object of all Bankruptcy proceedings being to divide the assets in the readiest and easiest way among the parties, and to give to the Bankrupt debtor a chance of again beginning work in life.

There is no proof that the creditors will be injured by this arrangement or that they will

affected by it, or that they will get a larger vidend through its being upset; and therefore do not think it would be right for the Court come to a judgment which would upset it.

I therefore concur in the judgment of the Master.

#### JUDGMENT OF HIS HONOR L. COX

21st May 1883.

I am of the same opinion.

Appeal dismissed with costs.

#### SUPREME COURT.

BREACH OF PROMISE OF MARRIAGE.—ORAL EVIDENCE.—PROOF OF SEDUCTION FOLLOWED BY PREGNANCY NOT A VIOLATION OF ARTICLE 340 CIVIL CODE.

*This is an action for breach of promise of marriage. The plaintiff sought to prove the averment that there had been promise of marriage by oral evidence, which right was contested by the defendant.*

*Held that oral evidence under the circumstances was admissible.*

*A further question was discussed, i. e. whether evidence was legally admissible to establish seduction.*

*On behalf of defendant it was urged that to admit such evidence would be to violate article 340 of the Civil Code which prohibits "la recherche de la paternité."*

*Held that such evidence should be admitted.*

ATISSE & ANOTHER,—Plaintiffs

versus

LEBON,—Defendant

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor J. ROUILLARD—Acting Puisne Judge

Y. JOLLIVET—Counsel for Plaintiffs

V. G. DUCRAY—Attorney for the same

V. K/VERN—Counsel for Defendant

E. GANACHAUD,—Attorney for the same

Record No. 21,830.

14th June 1883.

This is an action in which damages are claimed for breach of promise of marriage.

On behalf of the plaintiffs it was contended that there existed here a "commencement de preuve par écrit", rendering probable the allegation that the defendant promised to marry Félicie Atisse, and entitling the plaintiffs to prove that averment by means of oral evidence. In the event of this contention being rejected by the Court, the plaintiffs submitted that by our law, a promise of marriage was *de plano* provable by witnesses.

The plaintiffs' contention that there exists a "commencement de preuve par écrit", rests upon certain letters which the defendant admits were written by him to the plaintiff Félicie Atisse, and upon the answers elicited from the defendant in the course of his examination "sur faits et articles." We have carefully perused the letters produced. They abound in ardent expressions of love, and are clearly addressed to one for whom the writer professes the most passionate attachment.

The only natural conclusion to which they can lead, is that the defendant when he wrote was deeply in love with the Miss Atisse. There remains the questions, whether these effusions were addressed to one whom the defendant contemplated making his wife, or to his Mistress. The letters themselves do not supply an answer to this question. The defendant on his examination positively denied that the plaintiff Félicie had been his Mistress, or that he had asked her to be his wife. But the po-



sition which he thus assumes is quite irreconcilable with the sentiments expressed in his letters, which unmistakeably point to the existence of an ardent passion, either of an honourable or of a dishonourable nature.

We find ourselves therefore driven to elect between one of two alternatives, both of which are repudiated by the defendant. From the evasive and generally unsatisfactory nature of the defendant's answers, and especially from the fact that the defendant admits that at the request of Miss Atisse and her sisters, he introduced himself to and cultivated the acquaintance of Mr Atisse. (who lives apart from his family) a step which the defendant cannot explain, and which seems highly repugnant to the idea that he entertained dishonourable intentions towards his daughter. We think that the evidence renders probable the plaintiff's allegation, that defendant had contracted a promise of marriage towards the plaintiff. We accordingly find that the plaintiff is entitled to establish this averment by oral evidence.

A further question was also discussed before us, namely: Whether evidence was legally admissible to establish seduction followed by pregnancy. On behalf of the defendant it was maintained that to admit such evidence would be to violate the principle of art. 340 of the Civil Code, which prohibits "la recherche de la paternité." But we are satisfied that the admission of the evidence sought to be introduced by the plaintiffs, would not be a violation of this principle.

We are not asked to allow evidence, as between the defendant, and the child of whom Félicie Atisse is said to have at one time been pregnant, that the defendant is the father of the child; but merely as between Félicie Atisse and the Defendant, that a connection existed between them which resulted in the pregnancy of the former. Our finding on that point can have no effect on the status of the child, who is not a party to the action, and we admit the evidence solely for the purpose of substantiating one of the grounds in respect of which the plaintiffs claim damages.

In allowing such proof to be adduced we act in conformity with the decisions of the French Courts (Sirey 1865. 1. 33, and 1866. 2. 169) and the opinion of the most eminent French Commentators (Larombière article 1227 § 3; Demolombe, Mariage I § 29.)

## SUPREME COURT.

APPEAL FROM DECISION OF DISTRICT MAGISTRATE RIVIÈRE DU REMPART.—DEFENDANT OF "AUTHOR OF A NUISANCE" BY ORDINANCE 8 OF 1874.

*On 11th December 1882 the Sanitary Guardian of Rivière du Rempart served a notice upon the manager of "Mon Songe" to remove a nuisance.*

*The manager failed to comply with the notice or to appeal against it, and he was prosecuted before the District Court for breach of article 63 of Ordinance 8 of 1874, having failed to comply with the notice served upon him.*

*The Magistrate dismissed the case because he was of opinion that the "manager of a sugar estate cannot be considered as the author of a nuisance when such nuisance arises out of the bad position or defective machinery given to him by the proprietor." He adds "It cannot be said that the manager is the occupier of the estate consequently the owner should have been prosecuted."*

*By article 3 of the Ordinance, the author of a nuisance is defined as "the person by whose acts the nuisance arise or continues, or if such person cannot be found as ascertained the owner or occupier of the premises."*

*Held that as the act giving rise to the alleged nuisance is attributable to the defendant, whether he acted under authority or not, he must be held in law to be the author of the nuisance.*

*The judgment is quashed, and the record is remitted back to the Magistrate to be further proceeded with.*

PROCUREUR GENERAL.—Plaintiff

VERSUS

DISTRICT MAGISTRATE OF RIVIÈRE DU REMPART.—Defendant

Before

His Honor Sir A.G. ELLIS Kt.—Chief Judge

and

His Honor J. ROUILLARD—Acting Puisne Judge

—

M. GIBSON, Substitute Procureur General,  
—Of Counsel for Plaintiff

G. GUIBERT.—Attorney for the same.

W. NEWTON,—Of Counsel for Defendant  
Attorney for the same

—

Record No. 21,913

14th June 1883.

On the 11th December 1882, the Sanitary Guardian of Rivière du Rempart caused the following notice, under the provisions of Ordinance 8 of 1874, to be served on Hyacinthe Daniel, the manager of the Estate "Mon Songe" in the District of Rivière du Rempart:

"You are hereby required within a delay of ten days from the date of service of the present notice, 1o. to discharge no waters whatever from your sugar house into two pits as aforesaid" (these pits are situate close to the sugar house) "2o. to have the vicinity of your sugar house properly cleaned" "3o. The drain adjoining the pits carefully hoed and swept, the rubbish and putrid waters lodged therein carefully swept, and thoroughly removed."

The notice not having been complied with, and no appeal to the General Board having been made by Daniel as allowed by article 39 of ord. 8 of 1874, an information charging him with breach of art. 63 of the said ordinance was lodged in the District Court of Rivière du Rempart, and on the 16th of February following, after hearing evidence, the case was dismissed by the Magistrate. It does not appear from the record on what ground the judgment rests, a perusal of the record of the proceedings before the Magistrate shows that Daniel admitted that the alleged nuisance had been committed with his authority and sanction, but that evidence was produced by the defendant with the object of

proving that no nuisance existed on the Estate "Mon Songe" as alleged by the Sanitary guardian.

Evidence for such a purpose was quite irrelevant (see Procureur General *versus* Montille, Piston's reports for 1880 p. 6). Under ord. 8 of 1874 (article 39) whenever the author of a nuisance has received a notice to remove it, he may, if dissatisfied with the order, petition the General Board to review such notice; and the Board is empowered, after hearing evidence, if necessary, to discharge, modify, or suspend such notice. From the decision of the General Board there is, in virtue of ord. 6 of 1875, an appeal to the Governor in executive Council; article 63 of ordinance 8 of 1874 enacts that any person on whom there shall be served any notice, certificate or order and who shall fail within the term specified to comply therewith shall incur a certain penalty.

It follows, therefore, from the above that if the author of an alleged nuisance, has not appealed to the General Board from the notice, it becomes definitive, and the duty of the Magistrate is only to see whether the notice has been complied with or not.

It seems, however, from a note supplied by the Magistrate, and which was considered by both parties as containing the grounds of the Magistrate's Judgment, that he dismissed the case, not because he was satisfied that no nuisance existed, but because he was of opinion in law, that "the Manager of a sugar Estate cannot be considered as the author of a nuisance, when such nuisance arises out of the bad position or defective machinery given to him by the proprietor." The Magistrate further adds that. "It cannot be said that the manager is the occupier of the Estate, consequently the owner should have been prosecuted".

In this view of the law we cannot concur, by article 8 of the ordinance the words "author of a nuisance" are defined as "the person by whose acts the nuisance arises, or continues, or, if such person cannot be found or ascertained the owner or occupier of the premises."

In the presence of this definition we cannot concur with the Magistrate in holding that the manager of a sugar Estate cannot be regarded as the author of a nuisance. It is only when the person, by whose act the nuisance arises or continues, cannot be found, that the

owner or occupier of the premises is to be regarded as "the author of the nuisance", and that in the case of a sugar Estate, the owner must in all cases, be regarded as the author of the nuisance, is to violate the spirit and the letter of the law.

We find that the interpretation given by the Magistrate to the expression "author of a nuisance", is contrary to the true meaning of article 3 of ordinance 8 of 1874, and that, as the act giving rise to the alleged nuisance is attributable to the defendant, whether he acted under authority or not, he must be held in law, to be the author of the nuisance.

We accordingly quash the judgment of the Magistrate, and remit the record of the proceedings to the District Court to be further proceeded with.

### SUPREME COURT

CLAIM OF WAGES BY BRITISH SUBJECT ON BOARD OF A FOREIGN VESSEL.—JURISDICTION.—NOTICE TO CONSUL.—COMPETENCY OF SUPREME COURT, ALTHO' CASE MAY BE ONE FOR DISTRICT COURT.

*The Plaintiff was cook on board of the vessel "Pax" of which the Defendant was master. He claimed three months' wages, and the restitution of certain personal effects which he alleges the Defendant illegally detained.*

*Several objections were taken by the Defendant:*

*10. That the Supreme Court had no jurisdiction to entertain this suit, which was one between one of the crew and the Master of a Foreign Vessel. This was overruled.*

*20. That the institution of an action between a seaman and the master of a Foreign vessel must be preceded of a formal notice to the Consul of the Country to which the vessel belongs.*

*Held that in cases coming before the Admiralty Court such notice should be given, but that no authority had been cited for extending this doctrine to suits before the Civil Courts.*

*30. That under sections 188 and 189 of the Merchant Shipping act, a suit for recovery of wages for a less sum than that could not be instituted by a seaman before any Superior Courts of Record, except in special circumstances which are wanted here.*

*Held that these Sections do not apply to Foreign Vessels.*

*40. That the amount in dispute in this case was within the jurisdiction of the District Court, the action should have been raised there, and not in the Supreme Court.*

*Held that the jurisdiction of the District Court was doubtful, but even assuming that it had jurisdiction that fact did not withdraw the case from the jurisdiction of the Supreme Court, and the objection would resolve itself into a question of costs.*

*Case ordered to be proceeded with on merits.*

*On being recalled a further objection was considered, i.e. that in consequence of an article of the Netherland Commercial Code which regulates Shipping, crews on board of Dutch vessels are precluded from raising judicial proceedings against Masters of the Vessels, under penalty of forfeiting all wages due to them.*

*The article in question contains a "rôle d'Equipage" which must reproduce in full the article above mentioned as to the forfeiture of wages in case of judicial proceedings against the Master.*

*Held that as the plaintiff had not signed the forfeiture article, or given his assent to "rôle d'Equipage," the argument of forfeiture is no bar to the Plaintiff's action.*

*Judgment in favor of Plaintiff.*

BEAVIS.—Plaintiff

versus

BLOC.—Defendant

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor L. Cox.—Third Puisne Judge

—

W. NEWTON,— } Counsel for plaintiff  
V. DELAFAYE,— }  
H. BERTIN,—Attorney for the same

P. L. CHASTELLIER,—Counsel for defendant  
A. ROLANDO,—Attorney for the same

—

Record No 21,985

14th June 1883.

In this action the Cook on board a Dutch ship, claims from the Master of the vessel three months wages, and restitution of certain personal effects, which he alleges the Master unlawfully detains.

On behalf of the Master some preliminary objections to the jurisdiction of this Court were stated.

It was in the first place contended that the Supreme Court had no jurisdiction to entertain a suit between one of the crew, and the Master of a foreign vessel. We are clear that this contention cannot be sustained.

The jurisdiction of the Court, as defined by the royal order of 23rd October 1851, is declared to be the same as that vested in the Court of the Queen's Bench. Now it admits we think of no doubt, that that Court has jurisdiction to entertain a suit relative to the execution of a contract, even entered into abroad, where both the parties are within the jurisdiction of the Court, as is the case with the parties here.

But it is further contended that the institution of an action between a seaman and the Master of a foreign ship, must be preceded by a formal notice to the Consul of the country to which the vessel belongs.

In support of this proposition, reference was made to cases decided in the High Court of Admiralty in England, and to a decision in the Court of Vice Admiralty here. (Piston 1880 page 88). It is no doubt necessary that in cases coming before the

Admiralty Courts, such a notice should be given. But the jurisdiction and procedure before these Courts is special and peculiar, and no authority whatever was cited for extending this doctrine to suits before the Civil Courts, and in the absence of such authority we are not prepared to recognise such a limitation as qualifying the exercise of its jurisdiction by this Court.

It was further contended that under section 188 and 189 of the Merchant shipping act (17 and 18 vict. cap. 104) a suit for recovery of wages for a less sum than £ 50 could not be instituted by a seaman before any superior Court of Record, except in special circumstances which do not present themselves here—but must be brought before two justices of the Peace, or, in this Colony, before the Marine Magistrate. Now, if these provisions apply with regard to claims for wages by the crew of Foreign ships, no doubt our jurisdiction is ousted in such a case as this. A reference to section 109 of the merchants shipping act, subsections 5 and 6 however, satisfies us that sections 188 and 189 only apply to ships registered in the united Kingdom, and, in certain cases, to ships registered in Her Majesty's dominions abroad—but not to foreign ships, and the owners, Master, and crews of such ships. We must hold therefore, that our jurisdiction in the present case is not qualified by these statutory provisions. Finally it was contended that, in any case, as the amount in dispute is within the jurisdiction of the District Court, this action should have been raised there, and not in this the Supreme Court.

We entertain the most grave doubts, as to whether such a suit as the present, could competently have been instituted before the District Court, under the jurisdiction conferred on it by Ordinance No. 34 of 1852; at any rate, even assuming that the District Court had jurisdiction to entertain this suit, that would not oust our jurisdiction, and the objection would resolve itself into a question of costs.

Reserving therefore this last objection, in so far as it may affect the costs of the action, (in the event of the defendant being able to satisfy us that in such a case as this the District Court has jurisdiction), we must reject the preliminary objection taken by the defendants, and order the case to be proceeded with on the merits.

## JUDGMENT OF HIS HONOR L. COX

15th June 1883.

I am of opinion that in this case our judgment should be for the plaintiff. It is admitted that the plaintiff has worked on board the ship *Pax* as cook, at a salary, which was agreed on, of £6 a month. There has been work and labor done, and the plaintiff is entitled to recover the stipulated wages, unless it is shewn, as is contended for the defendant, that in consequence of some stipulation in the contract, he has forfeited his right to claim wages. It has been urged first of all, that there has been such forfeiture here, because in consequence of an article in the Commercial Code of the Netherlands, which regulates shipping, crews on board Dutch ships are precluded from raising judicial proceedings against the masters of the vessels, under penalty of forfeiting all wages due to them. The article is number 444 of the book which is given to us by Mr. Rogers, and which I for one have no difficulty in accepting as being the code of the Netherlands, on the subject it is there expressly laid down that under such circumstances, the sailor or seaman forfeits his wages. Now if it were shewn here that the plaintiff had signed the "rôle d'équipage", of which the statutory form is given in this code, and which according to that statutory form, must reproduce in full the provision of article 444, as to the forfeiture of wages in case of judicial proceedings against the master,—if he had signed or given his assent to the rôle d'équipage in presence of the competent officer, I think it would be clear that he would be barred here, assuming always that we could say that the voyages for which he had been engaged had come to an end. He has clearly not signed the forfeiture article, and he has never put his name to anything; he swears no writing passed between him and the captain. Therefore it seems to me that in order to give effect to such a forfeiture, we must be satisfied that he has agreed to it as a qualification of the contract. It is therefore a question of evidence, whether we are satisfied that Beavis, when he contracted, agreed that under those circumstances he would lose his right as a British subject to go to law and obtain his wages.

I cannot see that upon that question of consent or knowledge there is any presumption of law here; this man is a British subject, and he cannot be presumed to know the law of the Netherlands. He may be presumed to a

certain extent to know the law of his own but not that of a foreign country. As far as the evidence goes, we have his distinct statement on oath that he never saw those articles, that he knows nothing about them, and the Captain has not said one word which contradicts that. Therefore, I think that upon the first part of the case, the argument of forfeiture relied upon by the defendant is not made out, and is no bar to the plaintiff's action.

It is next contended that the plaintiff has deserted, and that this desertion has entailed as a penalty, the forfeiture of his wages under the same code of the Netherlands. I believe that in our legislation desertion entails similar penalties. The question is whether there has been desertion. That depends, in the first place, on the real nature of the contract into which the man entered. We have to see for what length of time or voyage he agreed to serve on board the ship. Upon that question he tells us in his evidence that he engaged as cook at the rate of £6 per month, and that at Mauritius he was to be placed on the articles. Now if we turn from what has been given to us as the authentic evidence of the engagement, the memorandum entered in the log book made by the Captain of his agreement with Beavis, I am unable to find a single word, the effect of which would be to bind the captain to keep that man for any number of voyages, or for any time after he had arrived in Mauritius.

There is nothing said, for instance, that he is bound to keep him on the return voyage to New Zealand; indeed the word New Zealand is not mentioned at all in the document, except for the purpose of shewing that the contract took place at a port in New Zealand. The captain himself in his evidence says, he did not consider himself bound to go there at all, and that he was bound to a very different place. That being so, it seems that the real effect of this contract on the evidence we have before us is this: Beavis agreed to work by the month up to the day that he reached Mauritius, and on that day a certain formal contract was to be entered into, in virtue of which he would be bound for a specific period of time, and at the same time, he would have this advantage, that he would be assured of his salary for the same period of time, he tells us that he made application to the captain to have that part of the contract carried into effect, and that the captain did not assent to his request. Captain Blok in his evidence has himself admitted that such a request was made to him. That being so, I must come

to the conclusion, that there has been a failure on the part of the Captain himself to carry out the special feature of the contract, and that as long as that part of the contract was not carried out, the position of Beavis towards him was this, he was not bound to continue his service on board the ship, after giving reasonable notice, just the same as if the captain had requested Beavis to attend before the consul and there to sign the articles, and Beavis had declined, the captain might have dismissed him. I think that the defendant here has had such notice as was reasonable, and it is impossible to say that there was desertion.

Therefore in the two points our judgment must be in favor of the plaintiff. He is to receive the sum prayed for, and the sum asked in default of having possession of his clothes.

JUDGMENT OF HIS HONOR SIR A.G. ELLIS KT.

15th June 1883.

I quite concur in what my learned brother has said. The first ground on which the claim is resisted, is that amongst the conditions directed by the Dutch law to be introduced into all ship articles, there is the stipulation that whoever shall institute legal proceedings during the course of a voyage, shall lose his right to wages. The admitted position of matters in this case is as follows; the plaintiff was never taken before the consul for the purpose of being placed upon the articles of the ship, nor has he ever signed the articles, but we are asked by the defendant to hold, that although the plaintiff has never signified his consent to be bound by those articles, another formality which was gone through by the captain—namely the insertion of a note on the ship's log, not even signed by the plaintiff, to the effect that the plaintiff had agreed to go in the ship, and to serve under the conditions of the articles—is to come in the place of any formal engagement. I confess I know of no authority whatever for any such contention as that, and certainly nothing in any of the articles cited at the Bar would go as far as necessary in order to support the argument of Mr. Chastellier. The article relied on, 395, does not provide that a binding engagement may not be entered into between the captain of a dutch vessel and a seaman, without formality fully establishing

the consent of the latter, and I think that the article containing the prohibition against legal proceedings, cannot be enforced against a seaman who has not been regularly placed on the ship's articles. That was not done in this case, and we have no evidence whatever to satisfy us that the plaintiff was aware of, and agreed to be bound by this very rigorous stipulation.

With regard to the question of desertion, I find myself in this position. No legal definition of what constitutes "desertion", according to Dutch law was, cited to us. The defendant certainly quoted an article from the Dutch Code shewing what penalty of desertion is, but we have no authority referred to which shows that according to the Dutch law, desertion differs in any way from desertion according to our own law. Now in the circumstances here, namely where a seaman engaged on board a ship on the promise that when he arrives at a certain port he shall be put on the articles, asks for the execution of that promise and is refused, then takes another course, and requests to be discharged, and that is refused, and finally asks to be allowed to go on shore in order to take legal advice; in such a case as that that I am not prepared to hold that, going on shore and proceeding to the Consul's office and then (not being able to communicate with the Consul) to the Magistrate, can be presumed to be desertion according to any law.

I accordingly think that the second ground on which the defendant endeavours to meet the plaintiff's demand, has not been sufficiently proved, and I perfectly concur in the conclusions come to by my learned brother.

## SUPREME COURT

PARTIES ABIDING BY THE DECISION OF THE COURT MADE TO BEAR THEIR OWN COSTS, ALTHO' DECISION IS GIVEN IN THEIR FAVOR.

*This is an action to declare the nullity of an adjudication of certain plots of land, and the defendant does not object to the judgment asked for, but the real question at issue was as to the costs of the suit.*

*Held that the plaintiff is entitled to his costs against the defendant, but with regard to other defendants as they abided by the decision of the Court, they should bear their own expenses.*

SINATAMBOU—Plaintiff,

*versus*

Widow SINATAMBOU & ors—Defendants.

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor L. Cox,—Third Puisne Judge

V. KJVERN, Counsel for Plaintiff,  
J. GUIBERT, Attorney for the same.

L. ROUILLARD, Counsel for Defendants.  
J. ELIE & VOLCY G. DUCRAY, Attornies for  
the same.

Record No. 21,970.

4th July 1883.

*Mr. Justice Cox* :—This is an action to declare the nullity of an adjudication of certain plots of ground which were awarded to the defendants upon a judicial sale to which the plaintiff and all the defendants were parties. It appears that widow Sinatambou who purchased, is the guardian of one of the heirs, and therefore incapacitated from purchasing, as averred by the plaintiff, in virtue of article 43 of ordinance 19 of 1868; and an action has been entered to have this adjudication set aside. The principal defendant does not object to the judgment asked for, and the only question is as to the costs of the action. After considering the matter, we think that the plaintiff is entitled to his costs against the defendant widow Sinatambou; but with regard to the costs of all other defendants, who appeared merely to say that they had no objection and would abide by the decision of the Court, we think that they should all bear their own expenses.

## SUPREME COURT.

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE BLACK RIVER.—LARCENY.—EVIDENCE INSUFFICIENT.

*This is an appeal from a conviction of the Acting District Magistrate of Black River, by which the appellant was sentenced to three months imprisonment for larceny of young trees.*

*Held that there is no evidence with regard to the abstraction of the trees. Conviction quashed.*

BHUNGUN—Appellant.

*versus*

THE QUEEN—Respondent.

E. GALLET, Counsel for appellant,  
A. PITOT, Attorney for the same.

W. NEWTON, Counsel for respondent,  
J. GUIBERT, Attorney for the same.

Record No. 497.

Before

His Honor Sir A.G. ELLIS Kt.—Chief Judge

and

His Honor L. Cox,—Third Puisne Judge.

JUDGMENT OF HIS HONOR SIR A.G. ELLIS Kt.

5th July 1883.

*This is an appeal from a conviction of the acting District Magistrate of Black River, by which the appellant was condemned to three months imprisonment, on an information charging him with a larceny of certain young trees.*

When we heard the case yesterday, it appeared to us that the principal point invoked in the appeal, was the question whether the offence had been established by sufficient evidence.

We accordingly took time to peruse the record. We have done so carefully, have come to the conclusion that in the depositions before the inferior Court, there was not sufficient evidence to send the case to a jury on such a charge. First of all, the evidence with regard to the identity of the trees found in the accused possession, namely: that they were those which were stolen from Mr. Rae, was extremely unsatisfactory—according to Mr. Rae, the trees that were stolen were six feet high, but according to all the evidence connecting the possession of certain trees with the accused, the trees in his possession were merely three feet high. That point might have been got over, but we find that there is still further a want of evidence, in fact absolutely no evidence, with regard to the abstraction of the trees. It is true that the accused was found in possession of the trees, but the charge against him is one of larceny, and there is nothing to establish such a charge as that.

In these circumstances the conviction must be quashed.

JUDGMENT OF HIS HONOR L. COX

5th July 1883.

I quite concur.

### SUPREME COURT

APPEAL FROM DECISION OF DISTRICT MAGISTRATE.—COMPETENCY OF APPEAL AS AMOUNT OF ISSUE IS ONLY Rs 200.

*This is an appeal from a decision of the District Magistrate of Pamplemousses dismissing an action entered by the Plaintiff under the following circumstances.*

*The Plaintiff alleged that there existed a Balisage Road between two landed properties in the neighbourhood of which he resides, and that that balisage Road had been used by the Public for more than 30 years; that the Defendant had caused four large holes to be dug in the middle of the road, by which the Plaintiff's use of the road had been impeded, and claims damages in the sum of Rs 200 with costs.*

*A preliminary objection was taken, that the appeal was incompetent on the ground that the conclusion of the plaint was for the exact sum of Rs 200, while the District Court Ordinance (34 of 1852, Art. 60) only allows appeals from the judgment of a District Magistrate to the Supreme Court, provided the value of the matter in dispute be more than twenty pounds, or if the ground of such appeal be for want of jurisdiction.*

*In reply the Plaintiff's Counsel urged that besides the claim of 200 rupees, it was a natural consequence, if judgment were given in the Plaintiff's favour, that the Road should be opened; and that therefore the matter in dispute was the right of the road, and was of much more value than 200 rupees.*

*Held that the value of the action is that which appears from the conclusion of the plaint or declaration. As the plaintiff's action was merely for 200 Rs, no appeal is competent.*

*Appeal dismissed with costs.*

DYEM,—Appellant

versus

DUFFAU—Respondent

Before

His Honor ANDREW MURK—Second  
Puisne Judge.

and

His Honor JOHN ROUILLARD—Puisne  
Judge.

TH. L. JENKINS, Counsel for appellant.  
T. SIMONET, Attorney for the same.

J. JOLIVET, Counsel for Respondent.  
L. WOERNITZ, Attorney for the same.

Record No. 788.

12th July 1883..

In this appeal a preliminary objection to the competency of the appeal was taken, on



the ground that the conclusion of the plaint was for the exact sum of Rs. 200, while the District Court Ordinance (No. 34 of 1852 Art. 60) only allows appeals from the judgment of the District Magistrate to the Supreme Court, provided the value of the matter in dispute be more than twenty pounds, or if the ground of such appeal be for want of jurisdiction.

It appears that the plaint alleged that there existed a balisage road between two landed properties in the neighborhood of which the plaintiff resides, and that that balisage road had been used and enjoyed for more than thirty years by the public and the persons living in its vicinity, that the defendants had ordered four large holes to be dug up in the middle of the road, by which the plaintiff's use of the said road had been impeded. He alleges that he had peacefully and quietly enjoyed and used the said road for more than a year and a day. The plaint further concludes as follows.

"Therefore an action hath accrued to the plaintiff to have of and demand from the Court a judgment condemning the defendants jointly and severally to pay to the plaintiff the sum of *two hundred rupees* for the loss and prejudice and damage he has suffered through the medium and wrongful act of the said defendant by rendering the said road impassable with his cart—with costs.

It was contended by the appellant's counsel that besides the claim for two hundred rupees, it was a natural consequence, if judgment in the plaintiff's favour were given, that the road should be opened, and that therefore the matter in dispute was the right to the road, and was therefore of much more value than two hundred rupees.

The Court cannot accept this argument as sound, the conclusions of the summons shows that the matter in dispute between the parties is a sum of two hundred rupees. Though the medium of arriving at the question of damage might be the right of the plaintiff to the road, yet he deliberately chose to limit his right before the District Magistrate to a claim of damages for two hundred rupees, which he must have regarded as a sufficient indemnity for violation of his right.

Nor does it necessarily follow that the right which he claims would have been conceded to him in virtue of such an action. An action in another form upon the validity of the right

might still have followed in the competent Court, which alone would have determined that question and become a *res judicata*. The matter in dispute therefore is the sum of two hundred rupees of damages.

In the case of *Jorre de St Jorre against the District Judge of Seychelles*, (18th February 1881) the Supreme Court in determining the question of the competency of appeal from the Court of Seychelles remarked "it is important that some clear and distinct principle should be fixed which should determine the competency of appeals to a superior Court, and we are inclined to think that the plainest and simplest test of the value of an action is that which appears from the conclusion of the plaint or declaration". That rule having been laid down upwards of two years since, must now be held to be the law on this subject known to the profession, and known to the public, and we again concur in thinking it the sound principle upon which to proceed. Even if the view of the appellant be taken into account, his allegation comes to this, that for a year and a day he has had the peaceful enjoyment of a right, for the violation of which he seeks two hundred rupees of damages. He has therefore himself estimated the value of the right at two hundred rupees, and, as to make an appeal competent the value of the matter in dispute must be more than twenty pounds, it is clear that he has limited his right of litigation, and made the District Magistrate's judgment final and definitive.

Again we say, that when an action contains conclusions merely for payment of a certain sum, the true tests of the competency of the appeal, and the true matter in dispute, is the sum which the defendant is called upon to pay.

We dismiss the appeal with costs.

## SUPREME COURT

### APPEAL FROM ATTRIBUTION OF SALE PRICE BY MASTER IN A LICITATION—MINOR SUMMONED AS BEING OF AGE.

*This is an appeal from a judgment of the Master in the matter of the attribution of the sale price of a property awarded in a licitation to the respondents on 25th July 1882. The licitation was prosecuted at the request of widow*

*Manuel against the heirs Manuel, by error the appellant, Emile Manuel, who was a minor, was summoned as being of age.*

*On this fact being made known to Edun and others, they began fresh proceedings in licitation, as between themselves and Emile Manuel, but they did not follow out the proceedings with proper diligence, and on 26th February 1883 Emile Manuel, who in the interval had become of age, obtained leave from the Master to be subrogated in lieu and place of Edun and others in the second proceedings of licitation.*

*On 13th February 1883, Edun and others requested that the sale price of the property purchased by them on the 25th July 1882, should be attributed to the parties entitled thereto. On their petition the parties interested were summoned, and Emile Manuel among others; he left default and was allowed the sum of 100 Rupees. From this attribution Emile Manuel appeals.*

*Held that Edun and others could not do otherwise than summon Emile Manuel.*

*Appeal dismissed with costs.*

—  
MANUEL—Appellant

versus

EDUN and ORS.—Respondents.

—

Before

His Honor A. MURE,—Second Puisne Judge

and

His Honor JOHN ROUILLARD—Acting  
Puisne Judge.

—

V. DELAFAYE—Counsel for appellant.

V. DUCASSE—Attorney for the same.

H. GALÉA—Counsel for respondents.

A. ROLANDO—Attorney for the same.

Record No. 21,927.

12th July 1883.

This is an appeal from a judgment of the Master in the matter of the attribution of the

sale price of a property awarded in a licitation to the respondents in the Master's Court, on 25th July 1882.

The licitation of the property was prosecuted at the request of widow Manuel against the heirs Manuel, and it appears that by error in the proceedings of licitation, the appellant Emile Manuel was summoned as being of age, whilst in reality he was a minor.

On this fact being made known to Edun and others, the purchasers, they began on the 3rd October 1882 proceedings in licitation as between themselves and Emile Manuel who had been insufficiently cited to the previous licitation, he being represented in this second licitation by his mother as his guardian, but as Edun and others did not follow out the proceedings with proper diligence, Emile Manuel, who in the interval had become of age, obtained from the Master, on the 26th February 1883, leave to be subrogated in lieu and place of Edun and others, in these second proceedings of licitation. On the 17th May 1883, the property was a second time awarded to Edun and others for Rs 4,000; the price fetched on the first sale having been only Rs 1,200. On the 13th February, Edun and others petitioned the Master praying that the sale price of the property bought by them on the 25th July 1882, should be attributed to the parties entitled thereto. On their petition the Master gave the usual order to "call before him the parties interested thereto," the petition and the master's order were served (as a matter of course) on Emile Manuel in person, the said Emile Manuel being then of age, but he left default, and default being also recorded against all the parties summoned, save Edun and others, the Master made, on the third April 1883, an attribution of price, in which Emile Manuel was allowed the sum of Rs 100. From the order of attribution so far as concerned him, Emile Manuel has appealed to the Supreme Court, on the ground that as he had not properly been made a party to the first licitation, no order could be given, attributing to him money arising from the licitation as aforesaid.

It was argued by the respondent that there was really no ground for appeal, that, as the appellant intended to avail himself of the irregularities of the proceedings in the first licitation, in order to repudiate the award in so far as he was concerned, he had only to abstain from taking the money attributed to him. The respondents also contended that they had only

complied with the master's order by summoning Emile Manuel, who had been called as a party to the first licitation, and that, supposing the Master to have erred in his judgment, they were not responsible for a mistake subsequently committed by him.

On the part of the appellant, great stress was put on the fact that it was to the knowledge of Edun, and of the Master, that proceedings in Licitation resulting from the irregularity in the former licitation, had been begun by Edun and others, into which proceedings Emile Manuel had been subsequently subrogated, and that under the circumstances, no attribution of price ought to have been made to Emile Manuel. In order to come to a proper decision on this somewhat delicate matter, it becomes necessary, in the first place, to consider whether Emile Manuel was properly called as a party to the proceedings in the attribution of the sale price of the property.

After due consideration, the Court thinks that Edun and others could not do otherwise but summon Manuel to appear before the Master. True an informality had occurred in the Licitation of the property belonging to widow and heirs Manuel, by the fact that Emile Manuel, then a minor, had been therein summoned as if he were of age, and Emile Manuel, might at any time, have availed himself of this irregularity, in order to repudiate the sale, in so far as he was concerned, but it is none the less true that, on becoming of age, he might have waived the irregularity and accepted the sale as a valid one, and received the sums accruing to him out of the proceeds of the sale; until Manuel's intention was notified in due form, he remained to all intents and purposes, one of the parties to the licitation, and the only course for Edun and others was to summon him as one of the parties interested.

In the second place, was Edun bound to inform the Master that a second licitation had been begun, as a consequence of the irregularities which had taken place in the first?

The Court has no hesitation in holding, that it was not a greater obligation upon Edun than upon the other parties who were duly called to appear before the Master, and who chose to leave default.

But had Edun and others informed the Master that there was another licitation pending between them and Emile Manuel, the Court does not see how the Master, in the

absence of any intimation from Emile Manuel as to the course he intended pursuing, could have done otherwise but attribute to Emile Manuel his share in the sale price of the property. Up to the last moment it was possible for Emile Manuel to waive his objections to the irregularity, and accept the sum attributed to him. Indeed, the fact that on 26th February 1883, Emile Manuel had applied to be subrogated in the proceedings in the second licitation, may have rendered probable that Emile Manuel did not intend to accept the first licitation as binding, but at the time the attribution of price (3d April 1883) was made, the second sale (17th May 1883) had not yet taken place, and might, after all, have happened that Emile Manuel, instead of prosecuting a sale, the result of which was as yet uncertain, would have preferred to take the sum attributed to him, and thereby put on end to all proceedings. In the absence of any information, the Master made an attribution in favor of Emile Manuel and we believe acted rightly. It follows therefore that there is no proper ground of appeal from his judgment. It would have been different if Emile Manuel having appeared before him and intimated that the first sale was not accepted by him as binding, the Master, in spite of this opposition, had persisted in attributing to Manuel a portion of the sale price of the property, but Manuel has not done so, and his complaint before the Court of appeal cannot be admitted.

The appeal is hereby dismissed with costs.

## SUPREME COURT

### SEIZURE OF GOODS IN A SHOP—INTERPLEADER CLAIM BY PERSON IN POSSESSION.

*The Plaintiff in this case had a claim against the Defendant. In virtue of a judge's order, he effected the seizure of certain goods in a shop which was pointed out by Defendants as theirs. The interpleader claimant was present in the shop at the seizure, and a signboard bearing his name was upon it. He protested against the seizure, the Usher recorded his protest.*

*The claimant alleges that he had given to the Defendant Moosaheb and one Choolum, who he says were the real owner of the shop, his security upon accounts for goods they had*

*purchased. That about the 20th May, being informed that Choolum and Moosaheb were unable to meet their engagements, and fearing that their shop might be seized, he agreed to purchase their stock in trade, and with them to form a partnership to work it.*

*The Claimant alleges that he advanced Rs 3000 in cash to Moosaheb, as consideration for the above agreement, and that the partnership was duly formed by a deed of Jollivet dated 27th May 1883, other purchases were made and he took possession of the shop.*

*The execution creditor denies the various allegations, and contends that the shop never belonged to Moosaheb and Choolum, but that it was the property of Nusesbun, (the wife of Moosaheb) whose sign board was on the shop until replaced by Syed Sahib's sign Board on 11th June 1883.*

*Further that the Claimant possessed mala fide, as he had not obtained the property by a lawful assignment, and cannot therefore plead article 2279 Civil Code.*

*Held that Claimant's possession was conclusive. He was in the shop, his sign Board and name were on it, he had a license taken out previous to the seizure, and objected to the seizure of the goods. He may therefore invoke article 2279 "en fait de meubles possession vaut titre."*

*Judgment in favor of Claimant with costs.*

—  
DAUGUET—Plaintiff

versus

MOOSAHEB and wife—Defendants

and

SYED SAIB—Interpleader Claimant

—  
•Before

His Honor Sir ADAM GIB ELLIS Kt. Chief Judge

and

His Honor LIONEL COX 3rd Puisne Judge

W. NEWTON, Counsel for plaintiff  
H. BERTIN, attorney for the same

V. DELAPAYE, Counsel for the defendant  
E. GANACHAUD, Attorney for the same

P. L. CHASTELLIER, Counsel for the "Interpleader claimant"  
G. A. RITTER, attorney for the same

Record No. 22,015

16th July 1883.

This is an interpleader claim by Syed Sahib, acting on behalf of the Partnership Syed Sahib & Co., and also in his personal name, to goods which have been seized by the plaintiff as being the property of the defendants his debtor. The seizure was effected before the plaintiff had obtained judgment against the defendants, in virtue of a Judge's order granted on the 22nd day of June last. Syed Sahib had no notice of the application for a provisional seizure. In virtue of that order, an usher of this Court proceeded to a shop at "Mon Désert", which was pointed out to him by the defendants as being theirs. The claimant was in the shop at the time, a signboard bearing his name, "Syed Saheb", was upon it, and he protested against the seizure. The usher recorded the protest but proceeded to seize a quantity of goods which are described in his memorandum. The claimant's case is as follows. He alleges that he had given to the defendant Moosaheb and one Choolum, who he says were the real owners of the shop, his security upon accounts for goods, which they had purchased from merchants in town. And that about the 20th of May, being informed that Choolum and Moosaheb were unable to meet their engagements, and fearing that their shop might be seized, he agreed with them that, after an inventory which was made on 20th May, the stock in trade would be sold to him, and that they would then form a partnership for working it. Syed Sahib also alleges that he advanced Rs 3000 in cash to Moosaheb, as consideration for the above agreement, that the partnership was duly formed by deed of Jollivet dated 27th May, that thereupon he and his partners made further purchases of goods from Dupin, Capeyron, Duff & Co. and other Merchants, and that he took possession of the shop and was in possession at the time of the seizure.

The execution creditor denies the various

allegations made by the claimant, and particularly the averments that the stock in trade was sold to Syeb Sahib, and that he paid Rs 3000 cash. Dauguet further contends that the shop never belonged to Moosaheb and Choolun, but that it was the property of one Nuseebun (the wife of Moosaheb) who had a License, and whose sign board was on the shop until it was removed about the 11th June last, and replaced by Syed Sahib's signboard. As to the possession invoked by the claimant, it is replied that he possessed *mala fide*, as he has not obtained the property by any lawful assignment, and that he cannot therefore plead article 2279 C. C.

Upon these various issues, we have had a considerable mass of evidence laid before us by the parties. It is not necessary for us to decide all the complicated questions of fact, which were insisted upon in the argument, as we think that the claimant is entitled to judgment, upon the clear ground that he was in possession at the time when the goods were seized, and that the execution creditor has failed to satisfy us that his possession was *mala fide*.

The evidence as to Syed Sahib's possession is conclusive. He was in the shop, his signboard and name were on it, he had a license taken out on the 4th June, and, as we have said, objected to the seizure.

Upon those facts, the claimant's position in law is the following.

He may invoke article 2279, which enacts that "en fait de meubles, possession vaut titre" and, as the second paragraph of that article cannot be set up against him, the goods being neither *stolen* nor *lost goods*, he must be presumed to be the owner unless the execution creditor can show that he held *mala fide*, i. e. as a trespasser without any colour of title, and knowing that the property belonged to another person.

Upon the evidence we think, it is impossible to look upon Syed Sahib as a trespasser; but on the contrary, we think he had some title to the goods. Whether that title *per se* was sufficient and conclusive to pass the ownership of the whole stock in trade to him, it is not necessary to determine, but it is one which enables him to say that his possession is not *mala fide*.

In the first place, we find the contract passed before Jollivet, by which Choolun

Moosaheb and Syed Sahib formed a partnership.

It is possible that, as argued for Dauguet, the contract is null as a deed of partnership, because the formalities required by article 42 C. C. had not been complied with, but still, when one of the parties to such a contract, has entered into possession as Syed Sahib had done here, and a third party tries to oust him, he may say I am in possession, and this contract shows that I am not a trespasser. The contract may be null, but that would not enable Nuseebun to tell him you possess *mala fide*.

But it was argued that Dauguet had acted as creditor of Moosaheb also, and that, as exercising the rights of his debtor, he may say the assignment made by Moosaheb is of no effect, because the deed is invalid in law.

We must notice that this position would be scarcely reconcilable with what we understood to be the real contention of Dauguet from the beginning of the case. His case was that Moosaheb had no interest in the shop which belonged to Nuseebun, he being merely her agent, and that he had assigned the property of the principal, without the principal's authority. But assuming that Dauguet may contend that Moosaheb was owner of part of the stock in trade, it is clear that he can have no more rights than Moosaheb himself. Now, what would be the position of Moosaheb against Syed Sahib in possession? He could probably, if the deed is really null, raise an action against Syed Sahib upon that nullity, and obtain a judgment that the assignment being null, Syed Sahib had no right to hold and possess his share, but we think it clear that he could not, without having obtained such a judgment, and upon his own authority, treat the possessor as a trespasser and eject him. We think it is equally incompetent for Dauguet to do so, altho' he has obtained a judge's order authorising him to seize; for that order is not binding upon Syed Sahib, who is not a party to it.

The same answer must be made to another question, which was raised with reference to the assignment of the stock in trade by Moosaheb. It was urged, and Moosaheb affirmed, that he had not received the Rs 3000, in consideration of which he consented to part with the property. Again we must say, if no consideration was given by Syed Sahib that is a ground upon which Moosaheb or his creditor may ask and obtain a judgment

declaring the contract null, and divesting Syed Saheb.

But until such a judgment has been obtained, we cannot hold that the man who is in possession in virtue of that deed, in which Moosaheb admits that the "fonds social" has been advanced by Syed Sahib, is nothing but a trespasser or *mala fide* possessor.

We also find that to some at least of the goods in the shop the claimant has a clear title, as they were purchased by him in the name of the partnership Syed Saheb & Co. Thus we find that on 1st June he bought from Dupin & Co. for Rs 320, and on 8th June from Capeyron & Delange for Rs 597.50, the goods so bought found their way to the shop at "Mon Désert", and we have evidence that some of them are among the articles seized by the usher.

It is also shown that Syed Saheb has paid various sums due by the shop, and that he has guaranteed to Capeyron and Delange and Duff & Co, accounts due to them by Choolum and Moosaheb for the purchase of goods which have also found their way to that shop. Under the circumstances it is impossible for us to hold that, as Dauguet contends, Syed Saïb possessed *mala fide*.

In the view we take of the case, it is not necessary for us to decide the other points of law which were raised for the execution creditor, for they cannot affect the decision which we have arrived at, that as Syed Sahib was in possession of the stock in trade at the time of the seizure, by application of article 2279 C. C., he must be presumed to be the owner of the goods claimed.

Our judgment must therefore be in favour of the claimant, with costs against Dauguet.

With regard to Nuseebun's costs, we do not allow her costs because she has not been successful.

### SUPREME COURT

APPEAL FROM DECISION OF FOREST LANDS PURCHASE COMMISSION—PURCHASE OF A PORTION OF LAND AT CUREPIPE.

*This is an appeal from a judgment of the Forest Lands Purchase Commission, fixing the value of a portion of land of 27 acres at Curepipe belonging to the Appellant. The facts of the*

*case are peculiar. On the case being called before the Commission, the Appellant stated that he did not intend to call any witnesses except himself, the agent for the Government filed his list of witnesses, and certain documents were to be produced later. On the Appellant's stating that he did not even wish to make himself heard as a witness, and that he would trust to the valuation of the Commission, the Government Agent stated that as such was the case, he would not call any witnesses—Documents were filed, arguments of the parties were heard; the Commission inspected the land and formed their opinion of its value.*

*Held that in adopting this procedure on the Appellant's motion, both parties have in truth constituted the Commission a Board of Arbitration, to whose examination and survey of the land they trusted for a correct result, and that, unless there has been some gross violation of the forms of justice in their procedure and judgment, there is no room for the interference of the Supreme Court.*

*Judgment of the Commission confirmed.*

HEWETSON.—Appellant

versus

MAURITIUS GOVERNMENT.—Respondent

Before

His Honor ANDREW MURE,—Second Puisne Judge

and

His Honor J. ROUILLARD—Acting Puisne Judge

W. HEWETSON attorney for himself appeared personally  
J. M. GIBSON, Substitute Procureur General,  
Counsel for Respondent  
J. GUIBERT attorney for the same

Record No. 22,006

18th July 1883.

This is an appeal from a report of the Forest Land Purchase Commission, by which the

commissioners valued a plot of ground at Curepipe belonging to the appellant at the sum of Rs 8050, and which plot of ground the Government had notified its intention to value, with a view to purchasing it under the provisions of ordinance No 10 of 1881.

The quantity of Land, of which the appellant is the apparent owner, amounts to thirty seven acres, as measured by the Government surveyor for the purpose of giving the notice required by the Ordinance. But the sole title which the appellant produces, is a deed of sale dated 25 June 1873, which bears that Mr Hugues sold to the appellant seventeen and a half acres for the price of seventeen hundred and fifty dollars, or three thousand five hundred rupees.

From the same deed it appears that the frontage of the land to the Brasserie road extends to thirty perches. It is extraordinary, if the measurement in this deed is correct, that the appellant has produced no other title to the Land, and beyond a vague verbal statement at the hearing, about adjudications, the dates and parties to which he failed to mention, he gave no indication whatever, either to the commissioners or to the appeal Court, what his other titles to the remainder of the Land were. The appellant puts a very high value upon this property. He argued to the Court, that he could carve out of it six or seven country residences, and without distinguishing whether one part of the Land has greater advantage than another, maintained that eight hundred rupees was the value of each acre of the Land, and thus that he was entitled to a sum of twenty nine thousand six hundred rupees, for what so far as appears, he, in 1873, paid Rs 3,500; on the other hand the Mauritius Government, both before the Commission, and in the appeal Court, maintained that the land in question ought to be divided into two portions, the first of them a square of about ten acres next the Brasserie road, and the remainder consisting of twenty seven acres lying to the southward of the first.

The contention of the Government agent appears to have been that, with the exception of a portion next to the Brasserie road, terrain Hugues was very uneven, and much exposed to the wind, so that it was not likely to be parcelled out, either for country residences, or for the gardens of Indians. The former portion he valued at Rs 200 and the latter at Rs 40 per acre.

The Commissioners so far maintained the

view of the Government agent as to divide the terrain Hugues into two portions, one of ten, and the other of 27 acres. They were unanimously of opinion that the first portion, which fronts the Brasserie road could be sold for country residences, and on it they have put the somewhat high value of Rs 400 per acre.

The report then proceeds thus with regard to the remaining 27 acres; they consider that they do not offer the same advantages, the land is more uneven, exposed to the wind, and only cultivable in small patches here and there.

One member thought that Rs 100 per acre was a sufficient price for this latter portion of the land. All the other members of the commission give an increased value, and fix the price of these 27 acres at Rs 150 per acre.

The question now raised by the appellant is, that his whole land should be valued at the high rate of Rs 800 per acre, and at least that the disproportion between the prices given by the commissioners for the first and second plots of ground is excessive.

The appellant's procedure has been peculiar in the highest degree. The minutes of the commission of the 6th April last, which was the first meeting for the valuation of this and another piece of land belonging to the appellant, bear, that on being requested to file his "list of witnesses Mr Hewetson informs the Board that he does not intend calling any witnesses except himself. Mr. J. J. Brown, Government agent files his list of witnesses.

" Documents to be produced, later. . . . Mr Hewetson stating, that he does not even wish " to make himself heard as a witness and that " he will trust to the "expertise" of the members of the commission, Mr J. J. Brown " states that as such is the case he will not " call any witness." The minutes then bear that on a special day subsequently documents were to be filed. Two days thereafter the arguments of parties were to be heard, and after two days more the inspection by the members of the commission was to take place. The procedure here sketched out must be held, not only to have been done with the appellant's consent, but to have been suggested by him, and taken by the Commission on his motion. The subsequent minutes of the commission show that the procedure was carried out that both parties produced documents, that neither of them led any evidence,

t that both of them were heard in argument, and thereafter the members of the Commission inspected terrain Hugues and formed their opinion of its value.

The Court is of opinion that by adopting this procedure in the appellant's motion, both parties have on truth constituted the Commission as a board of arbitration, to whose examination and survey of the land they trusted for a correct result, and that unless there has been some gross violation of the forms of justice in their procedure and judgment, there is no room for the interference of the Court. Both the Commission and the supreme Court derive their powers entirely from the Ordinance, and have no right to proceed otherwise than consistently with the provisions of the Ordinance, and also to keep in view those permanent principles of justice which lie at the foundation of the administration of all laws. The Commission has the general powers given to it necessary for a court of justice to possess, but above all they are constituted a Board of valuers, and it was a competent procedure to dispense with the leading of evidence, and to rely entirely on the powers of valuation of the Board. The parties, and especially the appellant, have committed themselves to this mode of settling the question between them. As the same Ordinance fixes the duties of the Supreme Court in hearing an appeal, it is well to note how it is to proceed at the hearing of such appeal. "The Court it is said (section 15) shall consider the report of the Commission, the evidence given and the documents tendered before the Commission, as the same appear on the minutes", and according to their view of these, the Court is to give judgment of confirmation, increase, or diminution of the valuation of the Commission. The same section bears that no additional evidence shall be admissible before the Supreme Court. From these passages it will be seen that the duty of the Supreme Court is especially to consider the evidence given before the Commission. What can be done if the parties have by their own action precluded the court from considering any evidence?

If they have, moreover, trusted themselves to the "expertise" of the Commission, they seem to have limited to a great extent their right of appeal. It is true that they have tendered documentary evidence, and so far as that goes the Court may consider it. We have accordingly carefully read all the documents produced, and are of opinion that none of these documents affect the question in hand; with the exception of one sale, almost all of

them are of large portions of land, and many of them at a considerable distance from the terrain Hugues.

The single sale referred to is that made by Shand and Co to P. L. Chastellier and Dr Henry Rogers, of six acres of the terrain Joachim, at the price of Rs 250 per acre. This piece of land as appears from a plan of Curepipe village exhibited at the hearing, is on the opposite side of the Brasserie road from the ten acres of the appellants' land which the commission has valued at Rs 400 per acre. As Chastellier and Rogers purchased their land in 1876, the Court is of opinion that the Commission has dealt liberally with the appellant in giving him Rs 150 of increased value for similar land.

In regard to the remainder of the land, viz the portion of 27 acres, the whole evidence which we have in the "expertise" of the Commissioners, who say that it is more uneven, exposed to the wind, and could only be cultivated in small patches here and there. This evidence we are bound to proceed on, and have nothing to contradict it, or even modify it. The appellant having made them the sole judges of these facts, the Court, in the absence of all indication to the contrary, must hold that they have not only acted conscientiously, but with good and sufficient knowledge of the question they had in hand.

This land being of the character indicated, we may reasonably conclude that there is little chance of its being taken up as a whole, or in its entire extent, for gentlemen's country residences, or for the gardens of indians. Further the procedure of the Commissioners does not seem liable to any criticism. It was arranged, with full knowledge of the appellant, that documents should be produced, the parties should then be heard, and the inspection subsequently take place. It might have been wiser that the inspection should have taken place first, and the argument afterwards; but as the parties were heard in conformity with their own wish, there does not seem to have been any departure from the forms of justice which would permit our interference.

On the *quantum* of the value of this part of the land, the Commissioners gave a far higher value for it, than that put upon it by the Government agent. They seem to have acted entirely in the interest of the appellant, and the Court, on this, as in the previous part of the matter, sees no ground for increasing the Commissioners' award.



The Court therefore gives judgment confirming the valuation of the Commission.

### SUPREME COURT

**CERTIORARI—JUDGMENT OF DISTRICT MAGISTRATE GRAND PORT—EMBEZZLEMENT—DECISION MAINTAINED.**

*In this case a writ of certiorari was issued to bring under review a decision of the District Magistrate of Grand Port, dismissing a charge of embezzlement brought against a Sergeant of Police, for embezzlement of a chopine of Rum, of which possession was taken to prove a contravention of the License Laws.*

*The grounds of the Magistrate's judgment do not appear from the record, which on the face of it does not shew any error.*

*Held that, as it is but natural to suppose that the Magistrate has considered the facts not sufficiently proved which were necessary to a conviction, and as no error appears on the face of the record, the Court cannot interfere with the present conviction.*

*The Rules is discharged.*

**REGINA,—Plaintiff**

*versus*

**THE DISTRICT MAGISTRATE OF GRAND PORT, AND LOBO,—Defendants**

*Before*

**His Honor A. MURK,—Second Puisne Judge**

*and*

**His Honor J. ROUILLARD,—Acting Puisne Judge**

**J. M. GIBSON,—Substitute Procureur and Advocate General,—Counsel for plaintiff  
J. GUIBERT—Attorney for the same**

**W. NEWTON Counsel for the Defendant**

Record No. 22,008.

18th July 1883.

The Court is asked to review by way of Certiorari, a judgment of the District Magis-

trate of Grand Port, given under the following circumstances.

A shop-keeper was alleged to have been found in contravention, for selling rum at regulation hours. A chopine of rum was seen in possession of an indian named Luximon as he was leaving the shop. The shop-keeper was not prosecuted for some reason in which we have not to inquire, but, on the indian Luximon claiming back his chopine of rum, it is alleged that it was not delivered to him; after enquiry, the defendant who was the sergeant of Police in charge of the station was prosecuted before the District Magistrate of Grand Port for embezzlement.

After the examination of the witnesses for the prosecution, the defendant calling none, the Counsel for the defence argued on his behalf that, from the facts proved, there did not result any embezzlement inasmuch as "the rum had not been confided by Luximon to the accused, and that such rum was kept against his will by accused."

The District Magistrate after taking time to consider, dismissed the case.

It was contended for the Crown that the decision of the Magistrate was erroneous. That the facts disclosed before the magistrate showed that the "chopine" of rum had been entrusted to the sergeant of Police, if not with the express, at all events with the implied consent of the Indian Luximon.

The learned Substitute further urged that if the Court was not satisfied as to that point, it must still hold that the transaction between the parties might be considered in the light of a "dépot nécessaire".

The grounds of the magistrate's judgment do not appear from the record, which, on the face of it, does not show any error.

But it is clear that, in order to come to his decision, the Magistrate must have considered that certain facts, essential to constitute a crime or misdemeanor, were not proved, and that he acquitted the defendant accordingly.

The Magistrate may, for instance, not have given credence to the statement of the indian, that the chopine of rum was not returned, or, he may not have found sufficiently proved, some other facts of the evidence.

If so, the Court cannot interfere. This rule

was laid down in Reg. v. Bolton L. Q. B. 66 as follows :

“ When the charge, is such as if true, is within the jurisdiction of the Magistrate, the finding of the facts afterwards by the Magistrate is conclusive.”

Again in Parker v. Notting Lane Railway Company 33. L. J. C. P. 193, the same rule is again laid down in the following words :

“ The effect of all the decisions upon that class of cases, is contained in Thompson v. Jugham, that, when the charge is such that if it were true, it could give the magistrate jurisdiction, his decision is final”.

As it is but natural to suppose that the Magistrate has held the facts not sufficiently proved, which were necessary to a conviction, and as no error appears on the face of the record, the Court cannot interfere with the present conviction.

The rule is therefore discharged.

### SUPREME COURT

#### APPEAL FROM VALUATION OF FOREST LANDS PURCHASE COMMISSION—TERRAINS DUROCHER AND LENFERNA.—INTEREST ON VALUATION.

*This is an appeal against valuation placed by the Forest Lands Purchase Commission on certain lands known as Terrain Durocher and Terrain Lenferna, belonging to appellant.*

*In order to arrive at their conclusion, the Board heard witnesses ; it had also before it the title deeds of the properties, shewing the prices which had been paid for them, and they further had the advantage of a careful personal inspection of the lands.*

*Proceeding upon this data, the Commission assessed the value of Terrain Durocher at Rs. 19,000, and of Terrain Lenferna at Rs. 4,960.*

*The award of the Commission is sustained.*

*The Court was also moved to grant interest on the valuation fixed by the Commission :*

*It declined to do so, as it has not been established that prejudice has been occasioned to the owner by the proclamation of the land.*

### IN RE

ALBERT LUCAS,—Appellant

versus

GOVERNMENT OF MAURITIUS Respondent

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor L. Cox,—Third Puisne Judge

L. ROUILLARD,—Counsel for Appellant  
F. ROBERT,—Attorney for the same

J. M. GIBSON, Substitute Procureur General,—Counsel for Respondent  
J. GUIBERT—Attorney for the same

*Purchase of Terrains Durocher and Lenferna*

Records Nos. 21,952 & 21,953

26th July 1883.

This is an appeal by Mr Lucas against the valuations placed by the Forest Lands Purchase Commission, on certain lands belonging to him, which Government are desirous of acquiring.

At the hearing before the Commission witnesses were heard on behalf of Government who valued “ Terrain Durocher ” at from Rs 16000 to Rs 19000, and Terrain Lenferna at from Rs 4900 to Rs 5000. These sums are very much less than those claimed by Mr Lucas, and than the value put upon his properties by the witnesses examined on his behalf. Mr Lucas, whose estimate it is right to notice was not in the opinion of witnesses examined by

him, excessive, valued the properties at Rs 49000 and Rs 14160 respectively. No doubt the difference between these amounts is very great, but similar divergence of opinion may be observed in nearly all the cases which have come before the Court on appeal from such valuations, and must indeed be expected, when the subject assessed is one which admits of such great latitude of opinion, as is to be found with regard to the value of land, and especially as between buyer and seller.

Such divergencies being naturally to be expected between the evidence of the witnesses examined on either side, it is fortunate that in arriving at a conclusion, as to the soundness of the estimate come to by the Commission, we have the advantage of evidence drawn from other sources. In assessing the value to be put on these lands, the Commission had before it the title deeds of the properties, showing the prices which had been paid for them in recent years, and they further had the advantage of a careful personal inspection of the lands.

Proceeding on the data before it, the Commission assessed the value of "terrain Durocher" at Rs 19000, and of terrain Lenferna at Rs 4960.

It was very strongly urged that, looking to the evidence produced on behalf of the appellant, the Commission had greatly underestimated the value of the Lands. As we have said however, the question of value is one admitting of very great latitude of opinion, and the mere fact that gentlemen called by the owner of the properties, put a much higher value upon them than that fixed by the Commission, cannot be regarded as conclusive against the valuation. If, turning from the oral evidence before the Commission, we examine the documentary evidence, we shall find that it supports the view taken by the Commission, and tends to show that the values put on the Lands by the appellant and his witnesses, are largely in excess of those at which these Lands have comparatively recently changed hands. From the titles produced with regard to the Terrain Durocher, it appears that the property was acquired by Mr Lucas so recently as February 1880, for the sum of Rs 12000.

The appellant however explained that he bought from his brother, and that the transaction must rather be viewed as a *gift* than as a *sale*. Now, if as we assume, the appellant means by this expression that he did not pay

a full price for the land, his view is borne out by the result come to by the Commission. If they fix the value, as in May 1881, at fully a third more than the amount he gave for it, little more than a year previously. But further we find from the same deed that in 1872 the land was purchased by the appellant's brother for Rs 9800. It was not contended that it was other than a purely business transaction, and if this was the value of the land ten years ago, the Commission in assessing it now at more than double that price, would appear to have made ample allowance for the increase in value of property in this neighbourhood.

If we turn to the titles relating to the "terrain Lenferna" we find that it was acquired by the appellant in 1873, on a sale by Licitation, for Rs 6000. No doubt this was a very good bargain, as in the following year Mr Lucas sold the wood on the property for the same amount. It is difficult however to believe that wooded land, which in 1877 was sold in open market for Rs 6000, or now, denuded of that which constituted its main value, be worth more than double the price which it then fetched. We think that in this instance also the history of the Land shows that the appellant and his witnesses, perhaps not unnaturally, ascribe a value to the land higher than that which it would fetch in open market.

It is also note worthy that, from documents produced, it appears that Land of a similar description, and similarly situated, has recently changed hands at prices lower than those fixed by the Commission in the case of these properties. It is true that higher values have been ascribed by the land Purchase Commission itself to land at no great distance, but an examination shows that this may be explained, either by difference in the quality of the land, by its more favorable situation, or by some other accident which may have been deemed to give these plots a value, which the properties with which we are now dealing lack.

But further in all such matters, very great weight must be allowed to the impression made on the Commission by its inspection of the land, and when, as in this instance, we find that its opinion, supported by the documentary evidence, corroborates the view taken by the witnesses examined by one of the parties, we feel that it is impossible for us to upset the valuations, merely on the ground that other witnesses valued the land at a higher figure.

We were moved to grant interest on the valuation fixed by the Commission.

It was held in the case of Dioré vs. Government, 3rd April 1883, however,—and in the principle there laid down, we entirely concur,—that “damages,” under Paragraph 4 of art. 3 of Ordinance No. 10 of 1881 can only be awarded, where the Proclamation of the land has occasioned prejudice to the owner.

In the present instance no prejudice has been established and we cannot therefore sustain the claim for interest.

We must accordingly sustain the award of the Commission, and dismiss these appeals.

In conclusion, we have only to add that, in confirming the valuations of the Commission, we do not wish to be understood as impliedly concurring in the observations made by the Commission, at the close of its report, with reference to the evidence of the appellant and of the witnesses examined on his behalf.

#### SUPREME COURT.

##### SUCCESSION.—INDIAN LAW.—DOMICILE.

On 17th December 1878 a partnership was effected between one Colandaveloo and three other Indians, for 3 years, reckoning from 8th October 1878, the seat of the business being in this island.

Sometime after the partnership, Colandaveloo left for India, where he died in October 1881, leaving a widow and three minor children.

The widow, as guardian of her three minor children, appointed R. Ramalingachetty and R. Vythelingum & Co. to recover the share of her late husband in the partnership.

Proceedings in licitation were begun at the request of one of the partners, and half of the sum of Rs. 15800, proceeds of the sale of the stock in trade, was deposited in the hands of the Master.

On 23rd May 1883 one Appatouray, brother of the late Colandaveloo—who intervened in the proceedings on account of the community of property alleged to have existed

between him and his brothers, including deceased,—caused a notice to be served on plaintiff's agent, alleging that a community had been formed between him and his brothers, and intimating that he, plaintiff's agent, was not to interfere in the affairs of the partnership, he the said Appatouray being alone entitled to claim and recover the sums of money accruing from the partnership.

Whereupon the present action was brought in which it is asked :

10. That the alleged community, stated to be represented by Appatouray, has no right whatever to the share of the late Colandaveloo in the above partnership.

20. That the said rights belongs exclusively to the deceased's minor son represented by his mother.

The document upon which the defendants found their claim to the share accruing to the late Colandaveloo, is a deed of community purporting to have been made before Sinatamby Poullé, a Tabellion of Karikal, which is French Territory.

Held that this deed did not apply to property acquired in Mauritius.

But there was another difficulty, the late Colandaveloo left one son and two daughters; the moveable property found in Mauritius, is claimed by widow Colandaveloo for her son only, to the exclusion of her daughters, this being the Indian law of succession.

The Court considered that the point is not so much whether this is Indian law, as to ascertain where was the deceased's domicile at the time of his death; as according to French law, the moveable property which a foreigner may leave at his death, is divided according to the country where he has his domicile.

Assuming that the deceased had acquired a domicile in Mauritius, when he left the colony, did he re-acquire his Indian domicile of origin, or did he intend to return to Mauritius, esteeming it his domicile of choice?

Ordered that the enquiry as to these points be re-opened, notice being given to defendants.

WIDOW COLANDAVELOO—Plaintiff

*versus*

APPATOORAY & ORS—Defendants

—

Before

His Honor ANDREW MURE 2nd Puisne Judge

and

His Honor JOHN ROUILLARD Acting Puisne Judge

—

H. GALÉA,—Counsel for plaintiff

W. EDWARDS,—Attorney for the same

W. NEWTON,—Counsel for defendant

H. BERTIN,—Attorney for the same

Record No. 21,901

27th July 1883.

On the 17th December 1878, a partnership was effected between one Colandaveloo and three other indians for three years reckoning from the 8th October 1878, the seat of the business of this partnership was Port Louis in this Island.

Colandaveloo left for India sometime after entering into the above partnership, and he died there on the 31st October 1881, leaving a widow, Meenatchee Aminoal, a minor son, Talaniappen and two daughters, also in minority.

Meenatchee Aminoal as guardian of her three minor children, appointed R. Ramalingachetty and K. Vythelingum & Co., to recover the share of her late husband in the aforesaid partnership.

Proceedings in Licitation were begun on the 20th October 1882 at the instance of S. Marimootoo, one of the partners of the late Colandaveloo, against 1o. the agents in this Colony of Meenatchee, 2o. the other partners of the firm 3o. Aroomoogachetty, Sinnappen, Rungasamy and Appatooray, the three former represented by Appatooray, now in this Colony.

Aroomoogachetty and others are described in the proceedings, as having been called on

account of the community of property, alleged to have existed between them and their brother the said late Colandaveloo.

The right of Aroomoogachetty and others to intervene in the proceedings, was never admitted, but on the contrary was reserved from time to time. The stock in trade of the late partnership, after sundry incidents before the master, was eventually sold for the sum of Rs 15,800 of which one half was deposited into the hands of the master.

On the 23rd May last, Appatooray caused a notice to be served on Ramalingachetty, agent of the plaintiff, alleging that a community had been formed as above, and intimating to Ramalingachetty that he was not in any way to interfere in the affairs of the partnership, he the said Appatooray as agent for his other commoners, being alone entitled to claim and recover the sums of money accruing from the partnership.

Whereupon the present action was brought in which the Court is asked to decree; 1o. that the alleged community, alleged to be represented by Appatooray, has no right whatever to the share of the late Colandaveloo in the above partnership.

2o. That the said right belongs exclusively to the said minor, Palaniappen represented by his mother.

The defendant in reply has put forward several pleas, of which one only, setting forth the alleged agreement relative to a community of goods, is considered by the Court as worthy of notice.

After several postponements, prayed for by the defendants on the ground that papers were expected from India, and that an attorney of this Court was detaining other papers on account of his fees not having been paid, a further postponement was asked on the 5th June 1883, and this being refused, the defendants allowed the case to proceed without being defended.

The document upon which alone the defendants found their claim to the share accruing to the late Colandaveloo out of the partnership he had formed in Mauritius, is a deed of community, such as the Court is informed are generally made in India, between the heirs of a deceased parent, in order to prevent the division of property. The deed, of which only a copy is before the Court,

and that copy produced not by the defendant, but by the plaintiff, purports to have been made before Sinatamby Poullé, a Tabellion of Karikal which is french territory.

It goes on to recite that Colandavelloo and his four brothers, have the desire to live in a state of community; that independently of the property which the five brothers have in common at Tranquebar, certain Estates specially mentioned in the deed, situate at Karikal and left by the deceased, are also put in common. The deed then proceeds to give to Aroumagachetty, one of the brothers, the authority to administer the community. Then occurs the following phrase."

" Les cinq parties ont déclaré d'une voix unanime que pour que le biens meubles et immeubles susdésignés, et les biens qu'ils vont acquérir à l'avenir, soient communs entre eux, ils font à l'amiable le présent acte de communauté."

This is the only mention made in the deed, and quite incidentally, to future property as being included in the community.

The Court heard an elaborate argument from plaintiff's Counsel on the indian law of community, and it was contended that according to that law the community includes the property left by the deceased head of a family, but never extends to the property which any one of the commoners may acquire by his labour and industry, and, in the present case, there is no doubt from the evidence adduced before the Court, that the property which Colandavelloo left in Mauritius was acquired by his labour and exertions. Assuming for argument's sake, that the Court could safely found a judgment upon a mere translation of a deed, which translation does not even appear to have been duly authenticated, it seems to us, without in any way founding our judgment on the Indian Law of community, of which no evidence was given to the Court, that the deed above mentioned does not bear the interpretation put upon it by the defendants. In the first place, as the deed specially details all the property at Karikal, and mentions the property at Tranquebar held in common, and as the stock in trade of the late Colandavelloo was situated in a foreign country from India, where community in such kind of property is wholly unknown, it would be putting a very forced interpretation on the deed, on the strength of a few incidental words, to hold that it was intended to operate in foreign countries where such commu-

nity as exists in India is unknown. In the next place, it is further to be noticed that the deed which provides carefully for the administration of the Estates put in common, the fruits of which are to be saved, does not determine the way in which the community is to take possession of the private Estate acquired by each of the commoners, or the time at which that property will accrue to the community, or the mode in which it is to be eventually divided. As it is not probable that parties to a deed would have left such an important subject entirely improvident for, the Court is inclined to think that the clause above cited, refers simply to one natural consequence of the community, namely that the money which will be saved out of the common property, will be invested in the purchase of other property.

It seems contrary to reason, that after 20 years exile, the property acquired by a man should not accrue to his heirs, and unless very strong evidence is given to show that the assets of the deceased are to be otherwise disposed of, the Court feels a natural disinclination to disturb the order of a succession.

Having thus disposed of the claim of the defendants, the Court finds itself in presence of another difficulty. As above related, Colandavelloo, who died in India, left a son and two daughters. The moveable property found in Mauritius is claimed by widow Colandavelloo for her son only, to the exclusion of her daughter, this being the Indian law of succession.

That the law of India is such, may be considered by Court as proved, after hearing Mr Stipendiary Magistrate Hodgson, who has for many years been a resident in India; but the point is not so much whether this is the indian law, as to ascertain where was Colandavelloo's domicile at the time of his death. According to the jurisprudence of the Courts in France, and the opinion of the generality of the commentators, the moveable property which a foreigner may have left at his death in France, is divided according to the Law of the country where the stranger had his domicile (See S. V. 62—2,337 S. V. 65.1.175.)

Whatever be the law of India, it would have been necessary that the Court should have been informed of the circumstances of Colandavelloo's life during the last years. The Court knows simply this: that he came to

Mauritius 20 or 25 years ago, that he worked at first as a clerk, then became a petty trader. That he left for India in 1878 and died shortly after his return there. Had Colandaveloo permanently left Mauritius in 1878?

Whilst he was working in Mauritius had he retained his domicile or principal establishment in India? Assuming that he acquired a domicile in Mauritius; when he left it, did he *animo de facto* re-acquire his Indian domicile of origin, or did he intend to return to Mauritius, esteeming it to be his domicile of choice? These are points which it is essential that the Court should know. The Court in consequence orders that the inquiry as on these points be reopened, and will give an early day to the plaintiff for that purpose, due notice being given to the defendants.



### SUPREME COURT

CLAIM BY CONSIGNEES FOR GOODS LANDED IN IN A DAMAGED CONDITION. — BILL OF LADING. — RECEIPT FOR GOODS ON BOARD BY LIGHTERAGE ESTABLISHMENT, NOT A DISCHARGE IN FULL RELIEVING VESSEL FROM RESPONSIBILITY IF GOODS ARE SUBSEQUENTLY FOUND TO BE DAMAGED.

*The plaintiffs are the consignees of certain goods landed from the "Guldax" of which the defendant is master. It is alleged that among other goods, 13 quarter casks of sherry were landed in bad order. They have refused to accept delivery of these goods, and claim from defendant the sum of Rs 1,820 as their value.*

*The defendant met the claim by a preliminary objection, to the effect that he holds a receipt for the goods from the Scottish Lighterage Establishment, which had received the permits to land the goods, and that according to the bill of lading the goods "are to be taken from alongside at consignees' risk" and expense. Receipts for cargo are to be "given before taken from alongside."*

*Defendant contends that the receipt extinguished all claims in respect of the damaged condition of the goods.*

*Held that the first part of this clause meant that "on safe delivery at the ship's side" the responsibility of the master for dam-*

*ages subsequently done to the goods, is "during their conveyance on shore, shall cease" and not that the mere delivery to the lighter's men, should operate as an extinction of liability for damages sustained by the goods during their conveyance on board ship.*

*With regards to the words "Receipt to be given for cargo before taken alongside" it was contended by defendant, that it was for the consignees to satisfy themselves that the goods had not been damaged before removing them from the side of the ship.*

*Held that defendant's contention, that the receipt tendered by him excludes any claim against him for damage of whatever nature, and constitutes a bar to their action, cannot be sustained, and ordered that the case be proceeded with.*

*At the same time the plaintiffs were ordered to shew that the damage of which they complain, was not sustained by the goods after they had been placed on the lighter alongside the vessel.*

GALDEMAR FRÈRES,—Plaintiffs

versus

C. ANDERSEN,—Defendant

Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge

and

His Honor A. MURE,—Second Puisne Judge

W. NEWTON, Counsel for Plaintiff,  
F. VICTOR, Attorney for the same.

P. L. CHASTELLIER, Counsel for Defendant,  
E. DUVIVIER, Attorney for the same.

Record No. 22,025

31st July 1883

The plaintiffs in this action are the consignees of certain goods landed from the vessel "Guldax", of which the defendant is master. Among the goods consigned to them were 13 quarter casks of sherry, which they allege were landed in bad order. They have refused to accept delivery of these goods, and they now claim from the defendant the sum of Rs. 1,820 as their value.

The defendant has met this claim by a preliminary objection, to the effect that the claim is barred by a receipt which he holds for the goods.

The Bills of Lading under which the goods were shipped, bear stamped on them the proviso that goods are "to be taken from alongside at consignees' risk and expense." "Receipts for cargo are to be given before taken from alongside." On the arrival of the "Guldax", the plaintiffs took out permits for landing the goods, which they handed to the "Scottish Lighterage Establishment." The lighters of that Establishment were sent alongside, and the clerk in charge, received the goods consigned to the plaintiffs and granted a receipt in the following terms: "Received from 'Guldax' 'x x x (17) seventeen barrels' the mark being specified.

The defendant now contends, that the receipt extinguished all the claims in respect of the damaged condition of the goods, which might otherwise have been competent to the consignees.

The questions for our consideration therefore are, what is the sound construction to be given to the clause quoted from the Bills of Lading, and whether a receipt, in the terms mentioned, is an absolute bar to all claims in respect of damage to goods? for which (for the purpose of this argument we must assume), the master would otherwise have been liable.

With regard to the first portion of the clause "to be taken from alongside at consignees risk and expense" we think it clear that the sound construction to be given to the words used is, that on safe delivery at the ship's side, the responsibility of the master for damages subsequently done to the goods, e. g. during their conveyance on shore, should cease; but we cannot read this portion of the clause, as meaning that the mere delivery to the lighter's men, should operate as an extinction of liability for damages sustained by the goods during their conveyance on board ship. This part of the clause specifies "expense" as well as "risk", and stipulates that both shall fall on the consignees, and the effect of the provision appears unquestionably to be, that *future* risk and expense in connection with the goods, shall be borne by the consignees, and not by the ship.

The clause appears to us to be equivalent

to one frequently to be met with in Bills of Lading, providing that cargo is to be taken from alongside free of risk and expense to the ship. In the case of *Moore v. Harris*, to which we shall have occasion to refer more particularly by and by, the words "to be delivered from the ship's deck, where the ship's responsibility shall cease" were inserted in the Bill of Lading, but were not even referred to by their Lordships of the Privy Council, as supporting the judgment in favour of the Master.

There remains, however, the latter part of the clause vizt: "Receipts to be given for cargo before taken from alongside." It was contended by the Defendant, that by the effect of this proviso, consignees were bound to satisfy themselves that the goods had sustained no damage, before removing them from the side of the ship, and were debarred from making any claim, when once a receipt had been granted and the goods removed. The question therefore is, whether, by granting a receipt for the goods in compliance with this stipulation, the consignees have renounced all claim against the Master, in respect of damage subsequently ascertained to have been previously sustained by the goods.

In support of his contention, the learned counsel for the defendant referred to several decisions, all of which we have very carefully examined. The cases mainly relied on were those of *Black v. Rose*, *Aspinall's Maritime Law Cases* Vol. 2 page 89; *Petroochino & ors. v. Bott*, *L. J. Reports* 1874 (C.P.) 217; and *Moore v. Harris*, *Aspinall's Maritime Law Cases* Vol. 3 page 178. In the case of *Black*, the charterparty contained a clause to the effect, that the cargo was to be taken from alongside and "to be taken from the ship's tackle at the port of discharge free of risk and expense to the ship." In that case a difficulty arose with regard to the payment of freight, and an action was brought by the consignee against the Master of the vessel, for not delivering a portion of the cargo pursuant to the charterparty.

The question at issue between the parties was, whether the master was entitled to require payment of freight, as the goods were delivered into the merchant's boats over the ship's side, or whether he was bound to deliver the whole cargo into the boats and wait till it was brought on shore before he had his freight. The Supreme Court of Ceylon held that the master was entitled to be paid



freight each day for the quantity delivered, as his lien would be given up on the delivery of each bag, and dismissed the consignees' action, and on appeal this judgment was affirmed by the Privy Council. The case however did not involve the consideration of whether the mere reception by the consignee of the goods into his boats, operated as a bar to any subsequent claim in respect of the bad condition of the cargo. The judgment of the Privy Council is confined to this: that as on the one hand delivery to the consignee deprived the shipowner of his lien, so on the other, it entitled him to claim payment of his freight *simul et semel* with delivery. In the case of *Petrochino & ors v. Bott*, the Bill of Lading contained the stipulation that the cargo was to be delivered from the ship's deck "where the ship's responsibility shall cease," and the decision was, that where it was proved that the Dock Company received from the ship and landed on the quay, the full number of bales specified in the Bill of Lading, the ship-owner was not liable for the subsequent disappearance of one of the bales. In that case, the loss was one which occurred after the delivery of the goods, and after the responsibility of the ship in terms of the Bill of Lading had ceased. The question raised was not as to liability for damage done to goods while in the custody of the Master, but as to partial loss, which was proved to have happened *after* the goods had left his custody.

The main case however on which the defendant relied, was that of *Moore v. Harris*. In that case the Bills of Lading bore this very special clause, that "no damage that can be insured against, will be paid for *nor will any claim whatever be admitted unless made before the goods are removed.*" In presence of this very stringent clause, their Lordships of the Privy Council rejected a claim for damage, made thirteen days after the removal of the goods. It will be seen however that in that instance the intention of parties—which must govern the decision in such cases—was unquestionable, and that the Bill of Lading expressly excluded all claims for damage not made before removal of the goods.

A careful study of these cases therefore, shows that none of them can be held to decide the question which is now submitted to us. It is right however to remark, that in the case of *Black v. Rose*, Sir Richard Creasy (C.J.) in his judgment, expresses the opinion that under a Bill of Lading couched in terms

similar to that before us, the consignee was bound to examine the condition and weight of the cargo, (in that instance bags of rice) before giving a receipt for them alongside. As we have said however, the decision in that case did not involve the consideration of the question whether, after a receipt had been given, claims by the consignee for damage were excluded.

Such being the state of authorities, and there being no decisions expressly in point on the issue now raised, we must consider what the true intention of the parties, in inserting this clause in the Bill of Lading, was. The defendant contends that the object and effect of the consideration, is to exclude *any* claim for damage to the cargo, whether latent or patent, on the part of the consignee after a receipt for the goods has been granted alongside. In the case of *Moore v. Harris*, the clause by which claims for damage were required to be made before removal, is qualified by the Privy Council as being a "stringent one"—and, altho' in that case, where the terms were so explicit as to allow of no doubt as to their meaning, effect was allowed to them, there can be no doubt that a waiver of a claim for damage, is not to be presumed, and will not be readily inferred, unless it necessarily results from the terms of the contract.

In the present instance it will be observed, that the terms employed do not expressly limit the time for advancing claims for damage to cargo. In the previous part of the clause reference is made to "risk", but as we have already said, it is clear that the "risk" there referred to, is liability, not for damage already sustained, but for damage accruing to the cargo after it has left the ship. If therefore, this clause operates as a bar to *any* claim for damage sustained by the goods while on board the ship, from causes for which the Master would otherwise be liable, it must be because the granting of a receipt, before the goods leave the ship's side, necessarily implies that the intention of parties was, that the giving of the receipt should extinguish any claim competent to the consignee in respect of damage.

After very careful consideration, we are unable to find grounds for arriving at such an inference as to the implied intention of parties. It is not to be presumed that a consignee intends to hamper his right to claim damages, by limiting his claim to any damages which he may be able to discover, on such an examination as may be made of the goods while in

the lighter and prior to its leaving the ship's side. When the damage is latent, and only to be discovered by an examination of the contents of the Bale and Cask, such a condition might bear very hardly upon him, and tho' no doubt it is one which he may undertake, and which, if he undertakes, we must give effect to, it is not one which appears necessarily to result from such a clause. It may be readily assumed that the consignee is willing to give at the ship's side, and as the goods are being placed in the lighter, a receipt for so many Bales of goods or casks of wine, numbered and marked in such and such a way, and such a receipt it is natural that the Master should require before parting with the custody of the articles. In this sense, we understand that both parties to the contract, are disposed to require and willing to grant receipts alongside. But we cannot assume that by such a stipulation as that here, it was intended by the parties that a receipt final and conclusive as to damage of every description, latent or patent, was to be demandable by the Master and exigible from the consignee, while the goods were lying in a lighter, alongside the vessel.

That the defendant's contention, with regard to the nature and effect of the receipt referred to in this clause of the Bill of Lading cannot be sustained, appears to be confirmed by the consideration, that the Defendant endeavoured to impose upon the word "receipt", a meaning and effect which does not belong even to that much more formal instrument the "Bill of Lading" itself. As was observed by Shaw (C.J.) in the American case *Hastings v. Pepper* (cited in *Parsons on Shipping* Vol: 1 page 188, note 2) "It may be taken to be perfectly well established that the signing of a Bill of Lading acknowledging to have received the goods in question in good order and well conditioned, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed but which was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case of such loss or damage, the presumption of Law is, that it was occasioned by the act or default of the carrier, and of course the burthen of proof is upon him, to show that it arose from a cause existing

"before his receipt of the goods for carriage, and for which he is not responsible".

As confirming the view which we take of the force to be allowed to the receipt required by this clause in the Bill of Lading, we may further refer to the case of "*The Energie*" (*Aspinall's Maritime Law Cases*, Vol. 2, page 296,) where, in the face of a receipt for a Bale of goods as "in good order", the consignee was allowed to show against the ship, that the Bale was delivered with its outer ropes removed, its outer and inner covering cut, and a piece of cloth missing.

As we are unable to sustain the defendant's contention, that the receipt tendered by him excludes any claim against him for damage of whatever nature, and constitutes a bar to this action, we must repel the preliminary plea urged by him, and allow the case to proceed. At the same time, we think that in presence of this receipt, it is incumbent upon the plaintiffs to show that the damage of which they complain, was not sustained by the goods after they were placed in the lighter of the Lighterage Establishment employed by them to land the goods.

### SUPREME COURT.

APPEAL FROM JUDGMENT OF STIPENDIARY MAGISTRATE—DELAY TO BE OBSERVED IN FILING OF APPEAL IN REGISTRY OF SUPREME COURT—ART: 272 OF ORD: 12 OF 1878.

On 21st July 1883, the Applicant was convicted and sentenced by the Stipendiary Magistrate of Flacq, for perjury. At the same time, in conformity with the requirements of Art: 272 of the Labor Law (Ord: 12 of 1878), the Magistrate informed the Applicant of his right to appeal against the conviction. The Applicant gave verbal intimation to the Magistrate of his intention to appeal, and entered into recognizance. The Magistrate intimated the fact to the Registrar of the Supreme Court, and three days thereafter, no appeal having been lodged in the Registry, the Registrar, in compliance with Article 1 of the Additional General Rules and orders of Court of 7th October 1879, forwarded to the Magistrate a certificate to that effect. By the second clause of Article 272 of the Labor Law, production of such a certificate is evidence that the appeal has lapsed and it is provided that the conviction shall thereupon

*be executed as if no notice of appeal had been given. In presence of the certificate, the Magistrate declined to send a copy of the record and evidence to the Registry.*

*The applicant contended that under the article cited, a delay of five days from the date of the judgment of the Stipendiary Magistrate, is allowed to parties desiring to appeal, to give written notice of appeal to the Magistrate, and to serve the same on the Respondent; and that by Article 116 of the Rules of Procedure in Stipendiary matters, an additional delay of three days is allowed for lodging the appeal in the Registry of the Supreme Court, and that having given written notice of his intended appeal to the Magistrate on the third instant, and lodged his appeal in the Registry on the 6th instant, he had timeously complied with the Law, and is entitled to proceed with his appeal.*

*Held that in accordance with article 272 of Ordinance 12 of 1878 the Magistrate should only have required the recognizance from appellant, after he had given written notice of appeal; and that consequently the intimation of the appeal had been sent to the Registry of the Supreme Court, and the certificate that the appeal had lapsed, had been issued before the delay allowed by law to the appellant had expired.*

*The Court cancelled the certificate granted by the Registrar, and ordered the execution of the judgment of the Stipendiary Magistrate to be stayed, pending decision of the Supreme Court, and further to bind the applicant under new recognizances, to prosecute the appeal in terms of his written notice of appeal, and thereupon to transmit to the Registry of the Supreme Court a copy of the evidence.*

OZEERALLY,—Applicant

versus

THE STIPENDIARY MAGISTRATE  
OF FLACQ,—Respondent

—  
Before

His Honor Sir A.G. ELLIS, Kt.—Chief Judge  
and

His Honor J. ROUILLARD,—Acting Puisne  
Judge.

B. COLIN,—Counsel for Applicant  
E. HUTEAU,—Attorney for the same.

J. M. GIBSON, Substitute Procureur General—  
Counsel for Respondent.  
J. GUIBERT.—Attorney for the same.

Record No. 17.

16th August 1883.

In this case a rule has issued, calling on the Stipendiary Magistrate of Flacq to shew cause why he should not (in accordance with article 275 of ordinance No. 12 of 1878) transmit forthwith to the Registrar of this Court, copies of the record and evidence in a complaint charging the applicant with perjury, and why the judgment pronounced by him on the said complaint, should not be stayed pending the decision of this Court.

On the return of the rule, the Magistrate was not represented, but the statements furnished to us by counsel for the applicant, and by the Substitute Procureur General, fully explain his attitude.

On the 31st ultimo, the applicant was convicted and sentenced for perjury before the Stipendiary Magistrate of Flacq. At the same time the Magistrate, in conformity with the requirements of article 272 of the Labour Law of 1878, informed the applicant of his right to appeal against the conviction, and the applicant thereupon gave verbal intimation of his intention to appeal, and entered into recognizance, to prosecute the appeal. On receiving the recognizance, the Magistrate at once intimated the fact to the Registrar of this Court, and three days thereafter, no appeal having been lodged in the registry, the Registrar, in compliance with article 1 of the additional general rules and orders of Court of 7th October 1879, forwarded to the Magistrate a certificate to that effect. By the second clause of article 272 of the Labour Law of 1878, production of such a certificate is evidence that the appeal has lapsed, and it is provided that the conviction shall thereupon be executed as if no notice of appeal had been given. The Magistrate accordingly declined in presence of the Registrar's certificate, to transmit to the registry of this Court copies of the record and evidence in the complaint against the applicant.

The applicant now contends that under the article cited, a delay of five days from the date of the judgment of the Stipendiary Magistrate,

is allowed to parties desiring to appeal, to give written notice of the appeal to the Magistrate, and to serve the same on the respondent; and that by article 116 of the rules and regulations of Procedure in stipendiary matters, framed under the Labour Law of 1878 and published in Government notice No. 91 of 1879, an additional delay of three days is allowed for lodging the appeal in the registry of the Supreme Court, and that having given written notice of his intended appeal to the Magistrate on the 3rd instant, and lodged his appeal in the registry on the 6th instant, he has timeously complied with the prescribed formalities, and is entitled to proceed with his appeal; and with that view to have this rule made absolute, and the Magistrate ordered forthwith to transmit to the registry of this Court, the record of the proceedings before the inferior Court.

In these circumstances the difficulty which presents itself is as follows: on the one hand the Magistrate is in presence of a certificate duly and properly granted by the Registrar to the effect that no appeal has been timeously lodged, which under paragraph 2 of article 272 of the Stipendiary Law is evidence that the appeal has lapsed; while on the other, the documents produced by the applicant, show that written notice of the appeal was given to the Magistrate, and lodged in the Registry of this Court, within the respective delays allowed by the Stipendiary Law.

The explanation of this apparent dilemma is not difficult to find, and lies, to some measure at least, in an oversight on the part of the Stipendiary Magistrate. A reference to article 272 of the Ordinance, shows that the binding of the party desiring to appeal by recognizance, is a step which is only to be taken by the magistrate *after* he has received written notice of the appeal. The words are "such person," that is the person desiring to appeal, "shall within five days after such judgment or order shall be made or pronounced . . . give notice in writing of such intended appeal to the Stipendiary Magistrate . . . upon which notice such Magistrate shall immediately bind the party so giving notice by the recognizance." In the present instance, the Magistrate without requiring written notice of appeal, allowed the applicant on his *verbal* intimation of his intention to appeal, to enter into recognizances. No doubt this was irregular and informal, though probably it was done at the express request of the applicant himself, in order to avoid

going to prison. The effect of this premature entering into recognizance, cannot in law be held to deprive the applicant of the delay of five days allowed him by law to give written notice to the Magistrate of his appeal, or of his right to lodge his appeal in the Registry of this Court within three days after giving such written notice. Yet in fact, this has been its consequence. The recognizance having been entered into and intimated to the Registrar, a certificate was granted by him that the delay for lodging the appeal has expired.

In granting this certificate, the Registrar acted strictly in conformity with the rule of Court above referred to, and had the recognizance, as is required by article 272, been entered into only *after* the applicant had given written notice of appeal to the Magistrate, and by doing so had exhausted the delay allowed him for giving such notice, the certificate would have been evidence that the appeal had lapsed, and the Magistrate would have been legally bound to decline, as he has declined, to transmit the record.

But as we have seen, the Magistrate by oversight accepted the recognizance before receiving written notice of appeal, and the fact that this mistake led to the issue of the certificate, cannot deprive the applicant of the delay of five days allowed him for giving written notice of appeal, or debar him from his appeal, unless within three days from the date of the recognizance, he lodged his appeal in the Registry.

We shall accordingly cancel the certificate granted by the Registrar, order that the execution of the judgment of the Stipendiary Magistrate be stayed pending the decision of this Court, and further require the Magistrate forthwith to bind the applicant under new recognizances, to prosecute the appeal in terms of his written notice of appeal of the 3rd instant, and thereupon, to transmit to the Registry of this Court, and a copy of the record evidence in the complaint against the applicant.

The formalities of notice to the respondent, and the Lodging the appeal in the registry having been already complied with. The appeal will be put out for hearing whenever the record has been received from the inferior Court.

## SUPREME COURT

APPEAL AGAINST ORDER OF A JUDGE IN CHAMBERS ISSUED IN VIRTUE OF ART. 50 OF ORDINANCE 24 OF 1882.—APPEAL IN-COMPETENT.

*This is an appeal against an order pronounced by a Judge in Chambers under Article 50 of Ordinance 24 of 1882. For the respondent it was urged that no appeal was competent against such an order.*

*Held that the appeal was incompetent. Costs reserved.*

THE ACTING CURATOR OF VACANT ESTATES—Applicant

versus

Mrs. E. A. MAINGARD—Respondent

Before

His Honor Sir A.G. ELLIS, Kt. - Chief Judge

and

His Honor J. ROUILLARD—Acting Puisne Judge

J.M. GIBSON, Substitute Procureur General,  
—Of Counsel for Appellant.

J. GUIBERT.—Attorney for the same.

V. K/VERN,—Counsel for Respondent.

F. ROBERT—Attorney for the same

Record No. 22,065.

17th August 1883.

This is an appeal against an order pronounced by a Judge at Chambers, under article 50 of Ordinance No 24 of 1882 (the Curatelle Ordinance 1882). When the case came on for hearing, it was contended on behalf of the respondent, that no appeal was competent against such an order, and on this objection parties were heard and we took time to consider.

After mature deliberation we are of opinion that this objection must be sustained, and the appeal dismissed as incompetent. The General rule is that the Court will not control and revise the decision of a Judge at Chambers, where the Judge acts under distinct and independent powers conferred upon him by statute.

In such cases the finality of the decision of the Judge must depend on the intention of the Legislature, as that may be gathered from the terms of the Law.

We think that it is clear, from the wording of the article under which this order was made (Art 50 of Ord. No. 24 of 1882), that it was not the intention of the Legislature that such orders should be subject to appeal. The first paragraph of the article confers on a Judge in Chambers distinct and independent power to make orders of the nature referred to. The second paragraph contains this proviso: "Provided that the Judge may in any case and shall in case of contestation upon the demand of either party where the property involved is of greater value than Rs 1000, refer the matter to the Supreme Court, which shall have jurisdiction to make such order". We apprehend that this clause, by which a discretion is given to the Judge at Chambers to refer any case to the Supreme Court, and a right to demand a reference to the Supreme Court is given to the parties where the value of the property involved exceeds Rs 1000, and there is contestation, by clear implication excludes the idea of the existence of a right of appeal.

The object of the Legislature in enacting this provision, was evidently to save the expense incident to appeals, and yet to ensure that on the one hand, in all cases of difficulty, the matter might at the discretion of the Judge, be submitted to the Court, and, on the other that, where the value at issue was considerable, and differences existed between the parties, they might have the option of taking the opinion of the Court upon the questions between them.

It was argued by the appellant that the procedure here had not been strictly regular, and that the summons calling upon him to shew cause against the order craved, was not accompanied by such a tender as is required by the article. If this were so, it was no doubt a proper ground of objection before the Judge in Chambers, and had it been stated would undoubtedly have received due consideration from him. But such an alleged formal irregularity cannot entitle the Court to review the order of a Judge at Chambers, which the Legislature intended should be final.

We must accordingly dismiss this appeal, Question of costs reserved.

## SUPREME COURT.

APPEAL FROM DECISION OF DISTRICT JUDGE  
SEYCHELLES — ACTION IN DAMAGES FOR  
NON-DELIVERY OF GOODS—RESPONSIBILITY  
OF CARRIER.

*This is an appeal against a judgment of the District Judge of Seychelles, under which he found Plaintiffs entitled to recover from the Defendants the sum of Rs 977.75, value of the goods shipped and not delivered, and damages for delay to the extent of Rs 400.*

*The action founded upon two Bills of Lading. The Messageries Maritimes admitted their indebtedness for the articles mentioned in the first Bill of Lading.*

*In the second Bill of Lading, of 100 empty casks and 34 packages of hoops shipped, only 7 were delivered.*

*According to articles 8 & 11 of the Bill of Lading the company were entitled to transship the goods, and were not to be held liable to damages for delay resulting from the transshipment. Further in case of loss, the Company was only to make good the actual value of the goods short delivered.*

*When the cause was heard, the Appellants moved that the case be remitted back to the District Judge of Seychelles, in order that he might reconsider it in connection with the construction to be put upon Article 8 of the Bill of Lading.*

*The Court was satisfied that article 8 had been considered by the District Judge, and declined the Plaintiffs' motion.*

*On the merits of the case, the Court held that according to the Bill of Lading the utmost delay that might take place in the delivery of the goods, was to be until the arrival of the second steamer which sailed after the goods were tendered to be conveyed by the Shipping Company.*

*The Respondents waited the arrival of five of the Appellants' ships at Mahé, without receiving of their goods, before they sued the Company for their value.*

*The value of the casks were shewn to be Rs. 10 each at Mahé, and no other evidence*

*showing that they were worth less had been adduced by the Messageries Maritimes Company. The Court confirmed the District Judge's decision, decreeing payment for the missing casks at the rate of Rs. 10 each.*

*With regard to the damages, the Court is unable to take the view of the District Judge, or to find that any damages whatever are due, this part of his judgment is therefore recalled.*

*As the Respondents have been unsuccessful in their claim of damages, and had the sum to which they are entitled considerably reduced, the Court finds them entitled only to one half their costs of this appeal.*

MESSAGERIES MARITIMES, Appellants

versus

COHEN, SIMON & Co—Respondents.

Before

His Honor A. MURE,—Second Puisne Judge

and

His Honor J. ROUILLARD,—Acting Puisne Judge.

W. NEWTON—Counsel for Appellant.

E. DUVIVIER—Attorney for the same.

V. DELAFAYE—Counsel for Respondent.

G. KÖENIG—Attorney for the same.

Record No. 778.

24th August 1883.

*This is an appeal against a judgment of the District Judge of Seychelles, under which he found the plaintiffs entitled to recover from the defendants the sum of Rs. 977.75, value of goods "shipped and not delivered," and under which he has also given the plaintiffs damages, on account of the delay which has occurred through the fault of the defendants (now appellants), to the extent of Rs. 400:*

The action is founded upon two claims under Bills of Lading dated respectively the second April 1882, and the 25th June 1882, of the goods contained in the latter Bill of Lading, twelve baskets of beer and one case of butter, were found in bad order, which was admitted by the defendants and the sum of Rs. 25 for three dozen and two bottles of beer which were spoiled, and the sum of Rs 19.25, for eleven boxes of butter, were admitted by the appellants at an early stage of the litigation to be due by them, and are not in question in this appeal.

In regard to the goods contained in the first Bill of Lading of the 2nd April, it is alleged that of one hundred empty cocoanut oil casks, and thirty four packages hoops, ninety three casks and the whole hoops have not been delivered. It is said that the whole of the other goods in the same Bill of Lading, were delivered to the respondents on the 23rd May 1882; and on the 13th of August following, seven empty casks were also delivered. It is then for the non-delivery of the goods contained in a Bill of Lading that the present action is brought.

The respondents further allege, that the aforesaid casks were of the utmost necessity to the respondents' agent at Mahé, for the conveyance to France of cocoanut oil, which they say is the only convenient means of remittance, made for the account of the said agency to the respondents.

They also allege that they have been prevented from the said 22nd May 1882, up to the date of the plaint, to send to Europe cocoanut oil of the amount of Rs. 3,000, in order to receive a larger amount of goods and merchandize from Europe, for the wants of the said agency, and in order to avoid interest on large sums of money put to the debit of the agency in France; according to the respondents, further damage was sustained through the fault of the appellants, by being prevented from carrying on their ordinary business at Mahé, with the proprietors who used to send them their oil and used to buy all their necessities at their agency.

When the case was first heard in the District Court, the plaintiffs produced the two Bills of Lading above referred to, and the appellants entered their pleas on record as follows: 1o. not indebted, 2o. The defendant caused no damage to the plaintiffs and 3o. General issue. The District Magistrate heard evidence in the case, from which it

appears that the casks had been shipped on board the vessel in the shape of staves, that the hoops were meant to be placed on the casks when they were put up at Mahé, and that the value of each cask at Mahé was Rs 10 each. The respondents' agent deposes in his evidence, that if he had received the casks, he would have sent away oil in barrels, that he could not take delivery of the oil sent to him for want of barrels, nor keep it in his store for the same reason, and that he had lost the value of the oil returned to him in goods.

It results from the Bill of Lading produced, that one hundred casks and thirty four packages of hoops had been shipped at Marseilles on the 2nd April 1882, and the body of the Bill of Lading contains the following obligations, after the master had bound himself to load them on the "Anadyr", "ou serait chargées sur l'un des deux paquebots suivant, pour être transportées à Mahé et délivrées à l'heureuse arrivée du Paquebot à Mr O. Bonnetard les marchandises marquées et numérotées comme ci-après." There are many conditions upon which the "Messageries Maritimes & Co" undertakes to carry goods, which are printed on the back of the Bill of Lading handed to the shipper, and of which it must be presumed he has been made aware at the time he makes his contract with the Shipping Company.

Of these articles 8 and 11 are important in the circumstances of the present case, the eighth being to this effect: "le capitaine se réserve la faculté de transborder en tout temps, même avant le départ sur un autre navire de la compagnie et même sur un navire étranger, les marchandises à lui remises, en cas de transbordement il ne garantit pas la place sur le paquebot devant recevoir transbordement à défaut de place et en attendant le transbordement, les marchandises groupées et objets de valeur seront débarqués et emmagasinés à terre et à flots aux risques et périls des destinataires, les frais demeurant seuls à la charge de la Compagnie. Les destinataires seront sans recours contre le Capitaine et la Compagnie pour les retards pouvant résulter du séjour au port de transbordement." The 11th article which is also important is as follows: Art: 11 "Le capitaine en cas de perte dont il ait à répondre, ne sera tenu de payer que la valeur intrinsèque des échantillons, marchandises, groupes ou objets de valeur perdus, sans dommages-intérêts et dans le cas où la déclaration faite à ce

objet sur le connaissance serait inférieure au chiffre réel de la valeur, cette déclaration fera la loi des parties. En cas de retard dans la livraison imputable à une faute du Capitaine, il ne sera dû de dommages-intérêts que s'il est justifié d'un préjudice."

The District Judge held it clearly proved at the barrels were duly shipped at Marseilles on the 2nd April 1882, and that they might in the ordinary course of things, to have been delivered at Mahé in the end of April or the end of May last, that no case of "force majeure" had been proved which prevented delivery in due time. That merchandise shipped after the said barrels, on board the appellant's vessels, had been received at "Mahé" and the judge adds: "and therefore article 8 of Bill of Lading cannot apply, even admitting for the sake of argument that it could have a legal effect in the circumstances of this case." He also considered that some damages were due on account of the delay, and assessed the same at Rs. 400.

At the hearing of the cause, the appellants' Counsel moved the Court to remit the case back to the District Judge, in order that he might fully consider and determine, with reference to the circumstances which might be proved, the construction which should be put on the 8th article of the Bill of Lading above quoted. With this crave the Court cannot agree.

It is true that the effect of the 8th article has not been stated at great length by the District Judge, but it is clear that he had it under his consideration, and there is no doubt that argument on the subject was addressed to him by the parties. It is not enough to warrant the grave step of remitting the case and commencing proceedings *de novo*, that certain articles of the Bill of Lading have not been analysed with the same acuteness in the inferior Court, as by an advocate of great practice and experience, practising in the appeal Court. It is to be hoped that all cases are better pleaded in a superior Court than an inferior Court, and that the points in debate are better seen in them as they proceed from a lower to a higher Court. That this usually happens is no reason for commencing the case again in the lower Court, and it cannot on that account be said that there has been a miscarriage of justice in the lower Court.

Having thus disposed of the first argument

for the appellants, we proceed to consider the merits of this case. They seem to us to be of much greater importance than they were regarded in the lower Court, and so require greater consideration of the principles of Maritime Law than was there applied to them. It will be observed that the ground of action, is not the total loss of the goods, but their non-delivery at the latest in the end of May. They might have been delivered in the end of April but the plaintiffs (now the respondents) put their case that they ought to have been delivered at the end of May. From that date they waited until the 26th of August, when the plaint was served, expecting the delivery of the missing goods. As seven of the casks were delivered on the 19th of August, the respondents had reason to suppose that there was little or no chance of the delivery of the rest of the goods. They had waited the arrival of five of the appellants' ships at "Mahé," the appellants' company have a regular monthly line of steamers, and as goods subsequently shipped at Marseilles had arrived there, they had waited a considerable time without receiving delivery, or without having traced the goods, or having their non-delivery reasonably explained to them. The question is, were the appellants justified in law in holding that the delay in the delivery, constituted a breach of the obligations and duties implied or expressed in the Bill of Lading, so that an action would lie for non-delivery of the goods therein. If there be no stipulation respecting the time within which the contract of affreightment or in a Bill of Lading is to be performed, the law implies that a reasonable time is meant, and that the shipowner will use reasonable diligence to deliver the goods at the port of discharge (see Maclellan on the law of Merchant Shipping page 444, 3rd Edition.) If the obligation be to carry within a reasonable time, it seems to follow that if there has been excessive delay, and which is unexplained, that very fact will make an action for non-delivery lie against the Shipping Company. It is conceivable that if some unforeseen cause, in which no blame can be imputed to the Shipping Company has occurred, and so performance of the Contract has been prevented by some "force majeure", or unforeseen facts which have occurred, the law will not impute blame to the shipper, and will free him from liabilities. But in the present case the very words of the contract which the body of the Bill of Lading contains, implies that the utmost delay shall be the arrival of the second steamer which has sailed, after the goods were tendered to



be conveyed by the Shipping Company. No other interpretation can be put on the alternative obligation which the appellants come under by the terms of the leading clause of the Bill of Lading. The words above quoted "chargées sur l'un des deux paquebots suivants pour être transportées à Mahé, et "délivrées", imply that the utmost delay which the Appellants Company desire, as there is a sailing of a steamer every four weeks, is one of two months after the sailing of that vessel to which the goods were tendered. On this first part of the Bill of Lading it seems as if the respondents were justified, after waiting the arrival of five successive steamers, in holding that a sufficient delay had occurred to lead to the conclusion that it was unreasonable, and that a legal liability had been incurred.

But it was further argued that the eighth condition on the back of the Bill of Lading, exempted the captain and company from responsibility for the delay. It will be remembered that the course of business of the "Messageries Maritimes Company", at the time the contract was made between the parties at Marseilles was this; that all the goods for the Seychelles and Mauritius line, were taken on board steamers bound for the far east, and that they were all transferred at Aden to the vessels of the Seychelles and Mauritius line, or probably all first landed at Aden and then reshipped for Mauritius. The article in question contemplates the transshipment before departure or at any period of the voyage, of the goods which the captain by the Bill of Lading has obliged himself to carry. It is clear that though the captain has the privilege of reshipment, his responsibility for the conveyance of the goods to the port of delivery remains entire, and he is not discharged from the duty of delivery, which is the principal end and object of his contract. No construction of this condition can be sound, which implies that the Shipping Company is entirely relieved of the primary obligation, of a Bill of Lading, that of the carrying and delivering the goods in the same state in which they were received. The clause is one in favour of the Shipping Company, and is meant to throw upon the owners of the goods the risks and perils of transshipment, but the obligation and responsibility of the carrier must be held to continue, until he has made a right and full delivery of the goods at the port of arrival. The delay which is spoken of generally and without limitation in this

article, must be interpreted to mean a reasonable delay, and not one which will have termination, during which the owner of goods in the Bill of Lading would never have right to enforce his claim of delivery, and we think it a fair interpretation of this Bill of Lading, taking the leading clause and the eighth condition together, to say that the Shipping Company have themselves fixed the delay which will be reasonable, at two months after the date of the first expected arrival of the goods. Further the clause seems to have been framed to meet the case of transshipment for the purpose of continued conveyance, and does not cover the circumstances which have occurred in the present case, which, as appears from the correspondence, were that the goods were landed at Aden, and were then lost sight of in such a way that the delay became quite unreasonable, and that the respondents were entitled to presume, though they could not prove it, that the goods had been entirely lost or destroyed. In the lower Court both parties seem to have taken it for granted, that if the respondents were entitled to succeed on this point, the loss which they had sustained was the value of 93 casks as set up and ready for use at Mahé. Certainly except a vague and hearsay hint of the value of such casks in France, the appellants nowhere suggest in the record, or in the proof, that a different might be a truer method of estimating the respondents' loss. There is abundant proof that the value of each barrel at Mahé was Rs. 10, and in the absence of any other satisfactory means of estimating the intrinsic value of the goods, the Court sees no alternative but to affirm the judgment of the District Judge on this point, and to hold the appellants liable in Rs. 930.

The District Judge has given Rs. 400 of damages to the respondents, without stating at any length the grounds upon which he has found this claim due.

It is now well settled, that damages will only be due in a contract under a Bill of Lading, if they were in the contemplation of both parties, at time the contract was entered into, and if they were the natural and immediate result of a breach of the contract so contemplated. The present claim of damage is made, because the plaintiffs say that it was necessary for them to send back oil to France in the barrels, as that was the only mode they had of remitting money to the parent establishment in Paris, that they were prevented from sending Rs. 3,000 worth of oil

ance, and that the agency at Mahé was  
ed with interest in consequence, and  
his whole business at Mahé was stopped  
use he could not receive oil from his  
omers. In the opinion of the Court, these  
its could not have been foreseen by the  
les when the contract was entered into,  
are they the natural result of the non  
very of certain barrels.

They seem purely speculative grounds of  
age, and some of them inconsistent in  
mselves. It is scarcely likely that the  
rels should both be sent away to France,  
l kept for storing oil received from his  
stomers, and both of these are items of  
e respondents' claim of damages. In like  
anner it would appear that their whole  
business was prevented for want of these  
rrels. It is difficult to see how the oil  
as prevented from being sent to his ware-  
house from the plantations where it was  
ade, for it must have been conveyed in  
essels of some kind from the makers of the  
il to the respondents' stores, and in these or  
vessels similar to these, it might have remain-  
ed until they received barrels for its recep-  
tion. Moreover the 11th clause of the con-  
ditions of the Bill of Lading, directly applies  
to the claim now made by the respondents,  
and nothing proved in this case overcomes  
the terms of that clause, which must be held  
to be the regulating law of the contract on  
this matter. On the whole of this part of  
the case, the Court is unable to take the view  
of the District Magistrate, and to find that  
any damages whatever are due, they there-  
fore recall this part of his judgment en-  
tirely.

Further the Court holds the appellants  
liable in payment of Rs. 25 and Rs. 19.25  
for goods damaged in the second Bill of  
Lading, which is admitted.

The whole sum for which the appellant  
will be held liable to the respondents, amounts  
to Rs. 974.25, and we recall the judgment of  
the District Judge so far as to give effect  
to the above view.

The question of costs in this case is some-  
what important. The respondents have been  
unsuccessful in their claim of damages, and  
have had the sum to which they are entitled  
considerably reduced, we therefore find them  
entitled only to one half of their costs of this  
appeal.

## SUPREME COURT

### ACTION IN DAMAGES.—PARTY ERRONEOUSLY CALLED IN A LICITATION.

*This is an action for damages under the  
following circumstances :*

*Some time after the beginning of 1882, pro-  
ceedings in licitation of a plot of land at  
Moka were begun by Widow Manuel, the  
present defendant, against her children.*

*By error one of her children, Emile Ma-  
nuel, was therein called as being of age  
whilst in reality he was a minor.*

*The property was awarded at the Bar to  
Edun and others, for Rs. 1,210.*

*On learning that as far as Emile Manuel  
was concerned, their purchase was null,  
Edun and others sued the licitation against  
the latter, and the property was sold for  
Rs. 4,000.*

*The claim for damages is founded on the  
wrong done to the plaintiff by Widow  
Manuel, and the following sums are claimed.*

*10. The sum of Rs. 300, as representing the  
difference in the share accruing to Emile  
Manuel under the first and second lici-  
tation.*

*20. The costs of the second licitation.*

*Several grounds of defence were urged by the  
defendant, but were disallowed by the Court.*

*The Court allowed damages to the extent of  
Rs. 627.25 and the costs of suit.*

EDUN—Plaintiff

versus

MANUEL—Defendant

Before

His Honor Sir A. G. ELLIS Kt., Chief Judge

and

His Honor JOHN ROUILLARD Acting Puisne  
Judge

H. GALÉA,—Counsel for Plaintiff.  
A. LHOSTE,—Attorney for the same.

W. NEWTON,—Counsel for Defendant.  
J. ELIE,—Attorney for the same.

Record No. 22,038

24th August 1883.

This a claim for damages made under the following circumstances : some time at the beginning of last year, proceedings in licitation of a plot of ground situate at Moka were begun by widow Manuel, the present defendant, against her children, as co-owners of the aforesaid plot of ground. By error, one of the parties to the proceedings in licitation Emile Manuel, was therein called as being of age, whilst in reality he was a minor. The property was awarded at the Bar of the Master's Court to Edun & ors, for a sum of Rs 1,210. On being informed that, in so far as Emile Manuel was concerned, their purchase was null and void, Edun and ors shortly after sued a licitation against Emile Manuel, but on the ground that Emile Manuel & ors had not used proper diligence in the carriage of the proceedings, Emile Manuel, in February last, obtained an order from the Master subrogating him into the proceedings begun by Edun and others. Eventually the property was sold at the Master's Court for a sum of Rs 4,000. The claim for damages in the present action is founded on wrong and injury caused to the plaintiff by widow Manuel, by her not having properly summoned one of the parties to the first licitation, and the damages are assessed at a sum of Rs. 1,111.48, composed as follows : 1o. the sum of Rs. 300 as representing the difference in the share accruing to Emile Manuel under the first and second licitation ; 2o. the costs of the second licitation, which as alleged were needlessly incurred and amount to Rs 811.48. The learned counsel for the defendant did not in principle deny that under the circumstances above related, damages were due by defendant, but urged several special grounds of defence which can be summarily disposed of.

It was alleged in the first instance, that if an irregularity had crept into the proceedings of the first licitation, the plaintiffs were quite as much to blame as the defendant, and that plaintiff ought, before purchasing at the bar, to have ascertained whether all the parties to

the sale had been regularly described in the "Cahier des Charges". This point we cannot sustain. The proceedings in licitation were instituted by the defendant against her own children. It was her duty to call the parties regularly before the Master's Court. It would be a strange anomaly to compel intending purchasers on pain of being responsible for the irregularities in the proceedings of sale, to verify amongst other things the ages of parties called by their names as co-licitants.

It was also urged that the plaintiffs have suffered no loss or damage, because in the first licitation, the property had been sold by error at a low price, and much below its real value. This is in reality no defence. If there has been an error, which error as the Court was informed, consisted in the fact that the attorney for widow Manuel being under the impression that the sale had been fixed for a different day, was not present at the sale, the plaintiffs are not responsible for the fault of the defendant, and they have acquired a legitimate claim to the plot of ground. It matters not therefore for the purposes of the case whether they bought, on the first licitation, at a high or low price.

The defendant also represented that the plaintiffs cannot claim any damages, because the second licitation was prosecuted originally at their own request, and that they began proceedings without ascertaining whether or not Emile Manuel intended to avail himself of the irregularities in the first licitation, in order to repudiate the sale in so far as he was concerned. On this point our opinion is that by suing the second licitation, the plaintiffs have done nothing more than exercising their legitimate right. They might indeed have attempted to make terms with Emile Manuel, and waited some time until he was of age, to enable him to ratify the sale, if he had been so inclined ; but this was a matter on which the plaintiffs had to use their own discretion, and if they thought that the better course, was to begin fresh proceedings in licitation, without waiting for the chance of making terms with Emile Manuel, they cannot be blamed for exercising their undoubted rights.

We accordingly feel bound to award damages, as a consequence of the facts imputed to the defendants, but whilst assessing the damages, the Court can only grant compensation for what is clearly attributable to the

of the defendant, and if for instance, the plaintiff claiming as damages the amount of costs incurred by the second licitation, it is shown that the costs have been increased by the negligence of the plaintiff, or by need-  
less litigation instituted by them, the Court will so far refuse compensation.

Amongst the items to which objection can be made, are two attorney's bills amounting to Rs 99.25 and Rs 115.02 respectively, for the subrogation which was made in the proceedings of the second licitation, by the fact of the plaintiffs not having used proper diligence.

We think these costs were occasioned by the fault of the plaintiffs, and cannot be taken into account in the damages allowed. We shall give the same decision as to two attorney's bills for Rs 160.12 and Rs 109.65, incurred in consequence of a petition by the plaintiffs, praying for an amendment of the "Cahier des Charges" in the second licitation. This prayer was eventually withdrawn, and the costs incurred in consequence must be borne by the plaintiffs.

This reduces the amount of damages which the Court is disposed to award, to Rs 627.25, namely Rs 300 for the difference of price between the two licitations, and Rs 327 for the costs of the second licitation, and for this amount and the costs of this suit, we accordingly find the defendant liable to the plaintiff.

### SUPREME COURT

#### APPEAL FROM DECISION OF FOREST LANDS PURCHASE COMMISSION—AWARD OF COMMISSION INCREASED.

*This is an appeal from a decision of the Forest Lands Purchase Commission, fixing the value of Terrain Wiéhé at Rs 6,585.80.*

*The evidence shewed that this land had been let for 19 years at an annual rent of Rs. 800.*

*The Court considered that this indicated the value of the land, and as at 9 o/o per annum Rs. 800 would represent a capital of Rs. 8,888.88, the award of the Commission was increased to that extent.*

*The Appellants pleaded that as the Rent was payable in advance, interest should be*

*added to the rent so as to raise the amount to Rs. 870 per annum, this was disallowed.*

*The Appellants also urged that as the land was proclaimed in May 1881, and upon that date rent ceased to be paid, they are entitled to indemnity.*

*Held that this was a question of law between the lesser and the lessee.*

GAUTRAY & WIFE & ANOR—Appellants.

versus

THE MAURITIUS GOVERNMENT,—  
Respondent,

Before

His Honor A. MURE.—Second Puisne Judge

and

His Honor L. COX,—Third Puisne Judge.

W. NEWTON.—Counsel for Appellant.  
E. GANACHAUD,—Attorney for the same.

J. M. GIBSON, Substitute Procureur General,  
—Counsel for respondent  
J. GUIBERT,—Attorney for the same.

Record No. 22,041.

24th August 1883.

This is an appeal from a decision of the Forest Lands Purchase Commission, by which the Commission found that the said piece of land called "Terrain Wiéhé" is of the value of Rs 6,585.80. Terrain Wiéhé is situated at Curepipe, and extends to 111 acres of land wholly surrounded by the lands formerly of Messrs Shand, now the Vacoa Sugar Estates Company. It is crossed by a road, and a stream runs through it. Three witnesses were examined by the Government, who were of opinion that the land was of inferior quality, being in many parts uneven and stony. These gentlemen reckon the land worth only Rs 50

per acre. Mr Shand was the only witness for the appellants, his knowledge of the land is better than that of any other witness, because a lease of the terrain in his favour, which has been transferred to the Vacoa Sugar Estates Company, has been entered into, many years ago, and in 1881 was continued for ten years further. Mr Shand estimates the land as worth Rs 100 per acre, and says that though he has only cultivated one portion of it, the Government proclamation of the Land prevented him from bringing the other portion of it under cultivation. The Commission came to the conclusion that Terrain Wiehé being leased, and the canes on it not being taken by Government, that the whole of the land, even with the brushwood, is worth only Rs 60, on an average. It appears that this land was let on lease from the 1st of June 1872 for 9 years, with the option to the lessees to continue the lease for seven further years. While that lease was in force on 8th May 1880, the parties executed a continuation thereof for ten consecutive years, reckoning from the 1st June 1881, the rent under this lease being Rs 800 per annum payable half yearly in advance. It thus appears that this land had been let continuously under lease for 19 years, at the rate of Rs 800, yet the Commission do not found their judgment on the existence of these leases, or on the value paid under them. Surely when a sum of Rs 800 is paid regularly and through many years, as the rent of land, it is clear that the value of it to the owner of the land, is a perpetual annuity equal to the rent; at the end of the lease, the land would have been restored to its owner probably improved in value by cultivation, and during the currency of the lease, an annual payment of Rs 800 would have been made to him. In short he would have his capital intact and an annuity of Rs 800 besides for 19 years. It is conceived that if land or any immoveable subject be let permanently and for a *bona fide* rent, there can be no better test of the value of the land, than the rent payable under the lease, yet this element has been wholly omitted by the Commission: while the Court is of opinion that it is its duty to estimate the value of this subject by reference to the lease.

It was suggested that as the rent was payable in advance, interest should be added to the sum of the rent, but the Court do not think that claim tenable; though paid in advance doubtless the sum was spent, and certainly could not be invested immediately at nine per cent, so as to raise the rent to Rs 870.

The rent may be looked upon as the produce of the land, in the same way as interest is the produce of money, and to give an additional sum would be in truth to allow interest upon interest. The Court estimates the sum of Rs 800 as the basis of the value of the land. The learned Counsel for the appellants capitalised this sum by taking it at eight per cent. Nine per cent is the ordinary rate of interest, and we think that the sum should be capitalised at that rate. We therefore find that the whole value of this land is Rs. 8888.88 and we increase the finding of the Commissioners to that extent. It is unnecessary taking this view of the case, that we should make any allowance for the value of roads and reserves.

Another plea of the appellants remains to be disposed of. The land was proclaimed in May 1881, and upon that date rent was ceased to be paid, the lessees apparently holding that they had no right to cut canes or continue cultivation of the ground after the proclamation. But it is evident that there is a question of law between the lessor and lessee, that question is not before us and we express here no opinion whether rent be still due or not. But it is clear that while that matter is unsettled, we cannot find an indemnity to be due to the appellants. We therefore limit our judgment to the sum previously mentioned.

### SUPREME COURT

CANCELLATION OF APPOINTMENT OF A GUARDIAN—WHAT IS A FAMILY COUNCIL, HOW COMPOSED AND BY WHOM SELECTED—ORDINANCE 4 OF 1871, AND ARTICLE 405 CIVIL CODE.

*This is a rule calling upon the Procureur General and others to shew cause why certain proceedings held before the Master, in which Mr Adrien Harel was appointed guardian of the minor Paul Maurice, should not be set aside and declared null and void.*

*On the 5th July 1883 a Family Council was assembled before the Master, and Mr Charles Smith was appointed guardian of his natural cousin Paul Maurice, Mr George de Boucherville being appointed sub-guardian, the resolutions were forwarded to a judge in Chambers for homologation.*

*Before the above Family Council was homologated and on the 16th July 1883, a second*

*Family Council was held, when Mr Adrien Harel was appointed guardian of the said minor Paul Maurice, and this latter appointment was homologated on the 23rd July by a Judge in Chambers.*

*he Procureur General attended in person, and explained the circumstances under which the second family Council had been convened.*

*The Plaintiff moved that the Rule he had obtained be made absolute, on the ground that the proceedings held before the Master were not competent, and the so called Family Council was not composed of relatives and friends of the minor as the law requires.*

*Held that the second Family Council was incompetent, and that the assembly held before the Master on 16th July, cannot be looked upon as a Family Council, within the meaning of the Civil Code and Ordinance 4 of 1871.*

*The Rule is made absolute, but as it had come out in evidence that the mother of the minor on her death bed, had desired that Mr Harel should be his guardian, the Court is of opinion that effect should be given to that wish, unless strong reason is shewn to exist why Mr Harel should not be appointed; and in order that the subject may be considered anew, the appointment of Mr. Smith is not homologated.*

*No order as to costs.*

SMITH.—Plaintiff

versus

PROCUREUR GENERAL & ORS.,—Defendants.

Before

His Honor A. MURE—Second Puisne Judge

and

His Honor LIONEL COX—Third Puisne Judge

T. L. JENKINS—Counsel for Plaintiff,  
J. MERCIER—Attorney for the same,

J. M. GIBSON, Substitute Procureur General,  
Counsel for Defendants  
J. GUIBERT—Attorney for the same.

Record No. 22,055.

24th August 1883.

This is a rule calling upon the Honorable the Procureur General, Frédéric Poirier, Edgar Morgan, Jean Benjamin Perille, Jules Courtois, Léon Ferré and Jean Evenor Rae, who are clerks in the Procureur General's office, and Mr. Adrien Harel, to show cause why certain proceedings held before the Master on the sixteenth day of July last, in consequence of which Mr. Adrien Harel was appointed guardian of the minor Paul Maurice, should not be quashed, set aside and declared null and void.

In this rule it is alleged among other things, that on the 5th July last, a family Council of the minor Paul Maurice was assembled before the Master, and that family Council appointed the applicant Mr Charles Smith who is a relative of the minor (being his "natural Cousin") to be guardian, and George de Boucherville, sub-guardian of the minor. That this resolution was forwarded to a judge in Chambers for homologation—that on the 16th day of July last, at the request of the Procureur General, Mr Poirier and the five other defendants, who are clerks in the Procureur General's office, assembled before the Master as forming the family Council of the same minor, and appointed another person the defendant Adrien Harel to be his guardian; and that this latter appointment was on the 23rd July last homologated by a Judge in Chambers.

It is further alleged that the persons who met before the Master on the 16th July last, are not in anyway related to the minor and that they have never seen him and do not know him at all. On the rule, the Procureur General appeared in person, and gave us the following important information. He stated that about the 16th of July last two gentlemen, Mr Montocchio notary public, and Mr Emile Sauzier attorney at law, called on him and informed him that the natural mother of this minor Elvire Maurice, had died leaving some property, that she had been unable to appoint (as she wished to do) a guardian to him by her will, but had expressed a wish on her death bed that Mr Adrien Harel should

be selected as his guardian. The Honorable Mr Pellereau tells us that he thereupon instructed the Government attorney, to take six of his clerks and form a family Council before the Master, for the purpose of immediately appointing a guardian to watch over the interests of the minor. Mr Pellereau was then entirely unaware that a family Council had been already held before the Master, and that the applicant Mr Smith had been appointed guardian. The minutes of the two "family Councils" held before the Master (the first appointing Mr Smith and the second appointing Mr Harel) are before us in evidence. The latter bears an order of homologation in the usual form dated 23rd July last.

The applicant moves us to make absolute the rule he has obtained, on the ground that the proceedings held before the Master were not competent, and that the so called family Council was not composed of relatives and friends of the minor as the law requires.

The defendants, other than the Procureur General, did not appear, except Adrien Harel who shewed cause. It was urged on his behalf that assuming the facts to be correctly stated in the rule, there is no ground for setting aside his appointment. The proceedings held before the Master were so held in virtue of Ordinance No. 4 of 1871, which makes provision for the appointment of guardians and sub-guardians to natural children. Article 1, after enacting that a natural child being fatherless and motherless shall have a guardian appointed by the District Magistrate, or by the Master, requires that if the child has property, then his guardian and sub-guardian shall be appointed by a family Council held before the Master of the Supreme Court, or before the Magistrate of the District where such child resides or is found. Then follows this proviso.

" Provided that the decision of the family Council be homologated by a Judge in Chambers upon the conclusions of the Ministère Public."

A subsequent Ordinance No. 11 of 1873, to remove doubts as to the convocation of family Councils enacts (Art. 2) that family Councils of minors whenever required by any law in force in this Colony, may be convened and held by and before the District Magistrate of the District in which the minor is domiciled, or before the Master of the Supreme Court upon an application made directly to the said Master."

Neither of these Ordinances explain what the Legislature meant by the word "Family Council", nor the mode in which such Councils are to be convened and held. We must therefore take the words to have the meaning which they have in the Civil Code and that the rules to be followed in convening and holding such assemblies are those traced out in Articles 405 and seq. of the Civil Code. The essential part of these rules may shortly be stated as follows: The Council convened by the "Juge de Paix" is composed of six relatives by blood or marriage when there are no relatives in sufficient number, the "Juge de Paix," is to call "des citoyens connus pour avoir eu des relations habituelles d'amitié avec le père ou la mère du mineur." The principle that the relatives are in the first place entitled to be called, cannot of course be fully acted upon in the case of a natural child, who according to the system of the Code has in law no relatives (except the parents who have acknowledged him). But the remedy is then indicated by Article 409. As there are no relatives there may be persons actually connected by blood with the minor, the "Juge de Paix" is not bound to call them, and may summon, in the exercise of his discretion, persons coming within the description given in Article 409. It is clear that the selection of the members of the family Council is by law entrusted to the "Juge de Paix" (Demolombe 1 p. 172).

" C'est le juge de Paix en effet qui dresse la liste des membres du Conseil de famille puisque c'est lui qui est chargé par la loi de le composer " (arg. des articles 409, 410.)

" Il aurait pu être dangereux pour les intérêts du mineur, de laisser à d'autres que celui-là même qui aurait requis la convocation dans un certain but, la faculté de former le Conseil des éléments qu'il aurait voulu choisir."

" Le juge de Paix sans doute, se renseigne auprès des parents, il peut adopter et même il adopte souvent la liste qu'ils lui présentent, mais son devoir est de s'en enquérir si elle est exacte et convenable, et en l'adoptant après cela il se l'approprie."

Not only has the "Juge de Paix" to fulfil this important duty of deciding who the members of the Council should be, but when the Council has been formed, he has other important duties still.

He presides over the assembly, has the right of voting upon the questions submitted to it, and has even a casting vote when the Council is divided, such being the functions which the "Juge de Paix", and therefore the Master has to discharge in connection with the family Council, the question arises, when that officer has once exercised those powers, when he has formed a Council for the appointment of guardian, when that Council has met under his presidency and made an appointment, is it competent for the Master to call together six other persons as being the family Council of the same minor, and allow them to appoint another individual to be the minor's guardian? If it is competent to call together a second Council and proceed to the appointment of a second guardian, it must also be competent to call a third, or fourth, or any number of Councils, and appoint as many different guardians to the same minor.

Such a result is, we think, clearly opposed to the spirit of the law, for the Civil Code Article 405 says: "Il sera pourvu par un 'Conseil de famille à la nomination d'un 'tuteur,' and the law nowhere contemplates that after the appointment has been made by a first Council, the "Juge de Paix" may practically cancel it by calling together another Council and proceed to another appointment. The mode of getting rid of an unsatisfactory guardian is quite different: He must be dismissed from his office (*destitué*) in the manner traced out in Article 446 et seq. of the Civil Code.

In Ordinance 4 of 1871 also power is given to the "Master and District Magistrates" on complaint brought, and if proper cause is shown, to revoke summarily any guardian appointed under the Ordinance, and a right of appeal to this Court is given from this decision.

It was argued for the defendants that in this instance the appointment made by the first family was not *final*, as Ordinance 4 of 1871 requires homologation by a judge, and that as long as there had been no homologation, it was competent to hold another Council and make another appointment.

After careful consideration of the argument, we think it is not conclusive in favor of the defendants. It is true that the decision of the family Council is not final in this sense, that the Ordinance requires it should be approved by a Judge—but as so far as the

Master is concerned it is final (until reversed by the judge), and it stands exactly in the same position as the appointment of the guardian to a legitimate child, when homologation is not required. We can make no distinction with reference to the Master's power to hold a second council, between the two cases, but consider that when he has formed and held a first council for the appointment of a guardian, when he has exercised the powers given to that effect by the Code and the Ordinance, those powers are exhausted and he cannot hold a second assembly of different persons as being the family council of the same minor, for the same purpose—appointment of a guardian—and thus practically annul the first appointment, before the Judge to whom the appointment is submitted for approval or disallowance, has pronounced his decision.

We think besides that the assembly, held before the Master on the 13th of July last when Mr Harel was appointed guardian, cannot be looked upon as a "Family Council", within the meaning of the Civil Code and of Ordinance 4 of 1871, for it is composed of persons whose sole qualification to represent the family of this child, appears that they are clerks in the Procureur General's Department. In law none of them comes within the class of persons who according to article 406, must be selected and called by the "Juge de Paix", when there is not a sufficient number of relatives, and in the absence of evidence that it is absolutely impossible to find such persons to serve on the family council, we consider that the appointment made by such an assembly is not to be homologated.

We are therefore of opinion that the circumstances offer good cause for refusing to accept Mr Adrien Harel as guardian of this minor,—and as the applicant was not a party to the order of homologation pronounced in Chambers, I think he is entitled to ask that the order should be recalled. We have next to decide whether the appointment of Mr. Smith should be homologated. We think it should not—not that there is the slightest imputation on his character—but because a most important circumstance, which was not apparently known to the family council, has come out in evidence before us. We have an affidavit by Mr Notary Montocchio, to the effect that the mother of this child on her death bed, expressed the wish that Mr Harel should be his guardian, and that she should herself have appointed him as testamentary guardian, if she had been able to do so. We



are of opinion that effect should be given to that wish, unless strong reason is shown to exist why Mr Harel should not be appointed—and in order that the subject may be considered anew, we refuse to homologate Mr. Smith's appointment. The formal judgment of the two branches of the case will therefore be :

10. The rule is made absolute.

20. We refuse in *hoc statu* to homologate the appointment of Mr Smith as guardian.

As all the parties have evidently acted from the best of motives we make no order as to costs.

### SUPREME COURT

ACTION IN DAMAGES FOR IMITATION OF  
TRADE MARK—COMMUNICATION OF COM-  
MERCIAL DOCUMENTS BY DEFENDANT TO  
SUPPORT PLAINTIFF'S CASE.

*The plaintiffs allege that they are the sole manufacturers and exclusive owners of a particular kind of paper well known in trade, and bearing a trade mark registered in Mauritius under Ordinance 18 of 1868, they claim damages from the Defendants for having imported into the Colony a paper of inferior quality, bearing a counterfeited trade mark which was a colourable imitation of that borne by the Plaintiffs' paper.*

*The Plaintiffs took out a summons, calling upon the Defendants to shew cause before a Judge in chambers, why they should not be ordered to communicate to the plaintiffs for their inspection certain documents, i. e., Commercial Books, correspondence, invoices &c., in their possession inasmuch as they contain good material and necessary evidence in support of the Plaintiff's claim in this action.*

*This summons was resisted by the defendants. Held that the Plaintiff's demand is of too vague a nature to form the basis of such an order as is here applied for, that it is within the power of the Plaintiffs, by personal answers or otherwise, to obtain information which will enable them more fully to identify the documents by description and date, or approximate date.*

*The Plaintiffs are allowed to amend the Schedule appended to their application, by specifying in detail the documents therein vaguely and generally referred to.*

ROLLAND & PAULY,—Plaintiffs

versus

WEDELES & Co. & ORS,—Defendants

Before

His Honor Sir A. G. ELLIS, Kt. Chief Judge

and

His Honor J. ROUILLARD,—Puisne Judge

P. L. CHASTELLIER,—Counsel for Plaintiffs  
A. ROLANDO,—Attorney for the same

T. L. JENKINS,—Counsel for Defendants  
A. ROHAN,—Attorney for the same

Record No. 22,067.

24th August 1883.

The principal plaintiffs in this suit are merchants in Bordeaux (France), and as they allege, the sole manufacturers and exclusive owners of a particular kind of paper, well known in trade and bearing a peculiar mark, which has been registered elsewhere, and, on the 18th May last, was registered as a trade mark in Mauritius under Ordinance 18 of 1868: the plaintiff's representatives in Mauritius in this action claim damages from the defendants, on account of damages which they allege that they have sustained, through the defendants' importation into the Colony of paper of an inferior quality, bearing a counterfeited trade mark which was a colourable imitation of that borne by the plaintiff's paper.

The plaintiffs have taken out a summons, calling the defendants before a Judge at Chambers, to shew cause why they should not be ordered to communicate to the plaintiffs for their inspection, certain documents in their

possession, and inasmuch as they contain good material and necessary evidence in support of the plaintiffs' claim in this action, and as "they believe that they will derive material advantage and support by the production of the said documents": the learned Judge referred the matter to the Court, and parties have been fully heard.

The defendants in the first place disputed the characters assigned to some of them in the plaintiffs' declaration, and this point falls to be noted. As however the point depends upon evidence which is not before us we cannot of course dispose of it now, but must deal with the application, as if the plaintiffs had substantiated their allegation on this head.

The documents of which the plaintiffs claim communication are: 1o. The books containing the commercial transactions of the defendant Prosper Limonière, a merchant trading in this place, with the defendants Wedeles & Co., merchants carrying on business in Paris & Hambourg, and certain third parties to whom they are alleged to have supplied paper bearing a counterfeited imitation of the plaintiff's trade mark; 2o. Correspondence passing between the several defendants and between the defendants and third parties here, to whom they have supplied such paper; and 3o. letter, orders, invoices and other documents relatives to papers ordered from Wedeles & Co. by Limonaire, either for himself or for third parties.

Ample authority was quoted by the plaintiffs, showing that by English Law and practice the plaintiffs might obtain an order from the Court or a Judge, calling upon parties to the suit to produce upon oath documents in his possession or power, relating to any matter in question in the action, and that such order could only be opposed by an affidavit setting forth the grounds of protection or privilege relied on by the defendants, in objecting to produce documents called for is opposed, and it was contended that under the royal Order of 23rd October 1851 similar powers were vested in this Court.

The defendants however contended that this was a matter in which the English practice was not applicable, inasmuch as such a demand was opposed to the provisions of the French Codes. But is this contention with regard to the state of the French Law well founded? The defendants based their argument under articles 14 and 15 of the Code de

Commerce; after carefully considering these articles we are of opinion that they cannot be cited as a bar to plaintiff's demand.

In the first instance they refer merely to "la communication des livres et inventaires", and do not apply to the documents, production of which is called for under the second and third head of the application, and further even with regard to such trade books, the 2nd article recognizes the right of the Court to order "communication", even of such documents with a view to extracts relative to the matter in dispute being taken. In the next place it was not seriously contended by the defendants that this was a commercial action, to which the provisions of the Code de Commerce were applicable, and no provision of the Civil Code was cited inconsistent with the English law and practice upon this point, we must accordingly repel this objection.

The defendants further contended that they could not be compelled to produce documents, the production of which might expose them to criminal proceedings under Ord. No. 18 of 1868—as however the plaintiffs pointed out, a bare allegation unsupported by affidavit, cannot be regarded as excluding the plaintiffs' demand.

After considering the plaintiffs' demand however, we think that it is of too vague and indefinite a nature to form the basis of such an order as is here applied for. It is to be observed, that the application is not for an order requiring the defendants to make discovery on oath of documents which are in their possession. What is asked is *production of documents alleged to be in defendants' possession*, and to relate to the subject matter of this suit. In such a matter (assuming that the parties from whom production is demanded are properly called as defendants in the suit, which as we have said is not admitted by the defendants) we must require some specification with regard to the document, communication of which is claimed, more definite than the exceedingly vague and general terms in which the application is couched. We are clear that it is within the power of the plaintiffs, by examination of the defendants on personal answers or otherwise, to obtain information which will enable them more fully to identify the documents, by description and date or approximate date, of which they claim production. We apprehend that the demand now made by the plaintiffs is too wide and indefinite, and that the defendants are entitled to more full and particular information

as to the documents of which production is craved.

We shall accordingly allow the plaintiffs time to amend the schedule appended to their application, by specifying more in detail the documents therein vaguely and generally referred to.

### SUPREME COURT

**CLAIM FOR DAMAGES FOR NON DELIVERY OF GOODS—DELAY IN DELIVERY, AND DAMAGE DONE TO GOODS SHIPPED ON BOARD THE MESSAGERIES MARITIMES STEAMERS.**

*This is an appeal from a judgment of the District Judge of Seychelles. The appellant was plaintiff below and sued the "Messageries Maritimes Company" in damages, for breach of contract with reference to goods shipped by him or his agents at Marseilles for Mahé. Damages were asked on the following grounds :*

10. *Non delivery of some of the goods shipped.*
20. *For late delivery of goods.*
30. *For damages to other goods.*

*The District Judge by judgment of 20th April 1883, allowed the appellant Rs. 253 in all, and one third of his costs instead of Rs. 4693.78 which the appellant claimed.*

*The main point discussed in the Court below was with regard to the liability of the Messageries Maritimes Company, for delay in the delivery of goods, which for want of room had been left at Aden.*

*According to article 8 of the Bill of Lading, the goods were to be transhipped at Aden and forwarded, if there were no room, in another of the Company's steamers—but in the event of there not being room in the vessel, the goods were to be stored at the Company's expense but at the owner's risk—the owners having no recourse against the Company, for delay resulting from the goods remaining at the Port of transhipment.*

*Held that the shipper has the right of insisting upon the goods landed at Aden for transhipment, being forwarded by the next following steamer to that in which they arrived; and as*

*they were not forwarded, the appellant is entitled to damages.*

*Judgment for Rs. 470.80 in favor of the appellant with one third of his costs below, and one half of his costs upon this appeal.*

**DELTEL,—Appellant**

*versus*

**MESSAGERIES MARITIMES COMPANY,—Respondents.**

**Before**

**HIS HONOR A. MURE,—Second Puisne Judge**

**and**

**HIS HONOR L. COX,—Third Puisne Judge**

**L. ROUILLARD,—Counsel for Appellant.  
F. ROBERT,—Attorney for the same.**

**P. L. CHASTELLIER,—Counsel for Respondents.  
E. DUVIVIER,—Attorney for the same.**

**Record No. 787**

**JUDGMENT OF HIS HONOR A. MURE**

**27th August 1883.**

I had recently occasion to deliver judgment in a case between the respondents and a different Company of traders than the appellant, and I do not again require to express my judicial views of the effect of the respondents' bill of lading and 8th clause thereof. But I may be permitted to express my satisfaction that the independent study of the terms of the Bill of lading by my learned brother Mr Cox, has brought him to the expression of an opinion which almost entirely concurs with my own. My learned brother having expressed his opinion on the law of this case, I shall endeavour to deal with it so as to put an end, so far as this and the district Court are con-

cerned to the litigation between these parties. The District judge having sustained the plaintiff's claim for damage on account of goods which had not reached him, and the judgment on that ground not being complained of by the respondents, it remains in that respect good and valid. The appellant further objected to the judgment of the District Magistrate, that the sum allowed by him for goods sent to Hong-Kong and Shanghai was not sufficient. It is true the appellant claims Rs 1200 of damages under this head and the District Magistrate only gives him Rs 100. From the evidence it appears that the goods in question consisted of six bales of calico goods of various kinds, which had been mis-sent, and arrived from Hong-Kong and Shanghai on the 3rd December 1882. They were part of the goods contained in the Bill of lading of 5th August 1882, and shipped from London. The appellant does not now claim the value of these goods, but estimates the damage at Rs 1200, because, as he says, he could with the profit on them have exported oil and obtained other goods from Europe. He further states that he could realise every month 20 per cent profits which makes for three months 60 o/o, by the easy mode he has of drawing drafts on Europe, and without reckoning the profits he makes on the oil. It is only necessary to read the appellant's mode of estimating the damage he has sustained, to perceive that his view of the matter is purely consequential, and such as no Court of justice can sustain. He ought to have set forth the direct loss he sustained, and proved that amount of loss; but in place of that he has stated a hypothetical case, and a set of contingent transactions, which might never have occurred, even if the goods had arrived in time. To show how futile is the claim made by the appellant on this score, I have only to refer to the evidence of Mamode one of his own witnesses, who says: "I have sent goods to France but have not made any profit on them, if Deltel has he has been more lucky than I."

The Magistrate has allowed for loss on this head Rs 100 and to the question of the amount of damage under this head I shall subsequently return—another ground of appeal is that the Judge does not mention and, does not decide, a claim of Rs 72.60 c. made by the appellant for damage done to three bales cotton goods, Nos. 106, 107 and 108. These goods were shipped from London in the bill of lading dated 8th July 1882, and arrived at Mahé on 12th August following—an expertise of these bales was made by the experts Mamode and Morenas, and the sum of damar-

ges claimed, is their estimate of the damage done, but both of them attest facts which lead to the inference, that these bales were not damaged at sea, but while they were being unshipped in the harbour at Mahé. Both of them in their evidence say, that these goods were freshly wet with salt water a day or two before they were examined, and that the edges alone of the bales were wet, as the bill of lading exempts the respondents from responsibility for damage sustained in unshipping, and in the lighters, and as it is not proved that the damage to these goods was done at sea and it is highly probable that it was done in the lighters in unshipping the goods, the Court is not surprised at the abstention of the Magistrate in dealing with this part of the claim, and declines to sustain the contention of the appellant, and to find the respondent liable therefor.

Another subsidiary matter, was the fact that the price of 24 cheeses was in the hands of Mr Cheyron the respondent's agent, and that the judgment of the district Magistrate gives the plaintiff the right to claim from him personally, the said price. I have considered the evidence on this matter, and am of opinion that the plaintiff has not proved satisfactorily and sufficiently, that he made a contract with Moulinier, which would give him a large profit on these cheeses. Moulinier is not examined, the contract note is not produced, and we have no evidence but the word of the appellant. The preponderance of evidence, is to the effect that the cheeses were sold by the mutual consent of the appellant and the respondent's agent, at the price which is very nearly the retail value of the cheeses in Mahé. Justice is sufficiently done, when we find the appellant entitled to recover from the respondents the sum of Rs 57.60, being the price of of twenty four cheesses or Rs 2.40 each.

There remains to be considered the damage due to the appellant for the breach of contract, in not delivering within reasonable time, the five shipments of goods made on 24th December 1881, 23rd January, 27th April, 24th May and 5th August 1882. Those in the bill of lading of 24th of December 1881, consisted of 15 bundles of iron pipes and one cask of hardware, which were shipped at London, and which the respondent's agent explains, remained at Marseilles for want of proper addresses until he claimed them.

This is mere hearsay evidence of the facts, and if the respondents' agent relied on that state of the facts, as a defence to the claim of

damage, he ought to have tendered it in the course of his proof; as the respondents did not prove this defence, we have no doubt some damage is due to the appellant. On the other hand the appellant claims Rs 200, because, as he says, if the goods had arrived in time, he could have with the money received other goods from France. This is consequential damage, but as the appellant says he could have sold these goods once at Rs 400, and another time at Rs 467, we have the means of giving a percentage on the value of the goods, which we consider the true method of estimating the damage, when there is a breach of contract.

The next shipment is that of 23rd January 1882, which arrived as Cheyron says on the 13th of September. The appellant estimates the loss of profit on the tubes then shipped, at Rs 50, but as he gives their value at \$ 57.60 c. we have the means here also of giving him a percentage.

The next shipment that of 27th April 1882 from Marseilles, consisted of 25 galvanised iron casks, which should have been delivered at Mahé on 19th May, but were not until 14th August, and for which the appellant claims damage to the extent of Rs 800, because as he says, he might have sent for goods upon which he would have gained a profit of 50 or 60 qo. We do not sustain this, but having proof that the value of each cask is Rs 10, and estimating the value of the casks at Rs 250, we shall give him a percentage thereon as before.

The next shipment consisted of 100 cases of soap from Marseilles, made on 21st May 1882, which were due on 16th June, but were delivered in Mahé on the 12th and 14th of August following, that is to say after a delay of only two months.

The appellant avers that he suffered a loss, on account of this delay of Rs 200. As he says he might have sold the soap at Rs 8 per case, whereas he was obliged to sell it at Rs 6. He himself only says that up to the 7th of August soap was selling at 8 rupees, but the witness Mamode states that soap on account of its scarcity in the market was very dear, and sold at Rs 8 from the 15th of July to the 7th of August. As the appellant's soap should have arrived on the 10th of June, and as he leads us to believe that he sold his goods almost immediately on arrival, and made his alleged large profits by quick turns over, it does not follow, and is not proved,

that he would have made his alleged profit by this transaction.

The Court disallows the claim of damage on this head. It is more easy to come to this conclusion, as the delay of delivery was very short, and it is doubtful whether it was beyond the reasonable one which the respondents are entitled to, under their bill of lading.

The last bill of lading we have to consider, is that of 5th August 1882, containing goods shipped from London. In regard to these goods a careful examination of the evidence shows that they are the same goods as were sent on to Hong-Kong and Shanghai, which were supposed to be lost when the plaint was entered, and for which he claimed in his plaint the whole value of the goods Rs 2296. 18 c., a great number of the bales in the bill of lading were sent on to Mahé in direct course, and as no complaint is made with regard thereto, we presume were received in the ordinary course of transit.

The rest of the goods went on to Hong-Kong and Shanghai. A careful comparison of the numbers of the bales in the bill of lading, and in the evidence of the appellant and respondents, brings out the fact, that these are the very goods for which the district Magistrate allowed the appellant Rs 100 of damages, for carelessness in sending the goods to China. It is to the same goods that the district Magistrate refers in the following sentence. "With regard to the regatas, prints, grey cotton hoes, cheese, &c., no proof has been made that Deltel has suffered any loss on the subsequent sale of those goods and merchandize."

With this remark we entirely concur, but on the other hand we know the exact value of these goods—deducting Rs 84 for the cheese which is otherwise dealt with, there remains a sum of Rs 2,206. 18 c. as the total amount of their value—allowing a percentage of 9 qo, which is the ordinary rate of interest of this Colony we get a larger sum than the Magistrate allowed to wit Rs 198.

To this we have to add a sum at a similar percentage, upon the other items of damage above allowed, and we reach a sum equal to Rs 260.

Adding to this the sum of Rs 153 allowed by the District Judge for goods lost and Rs 57.60 for the cheese, we reach as the entire sum to which the appellant is entitled, that of

**Rs 470.60 c.**, and recalling the judgment in toto of the District Judge on the merits, we order the respondents to pay the appellant the said sum of Rs 470.

As to costs, we do not interfere with the judgment of the district Magistrate, finding the appellants entitled to one third of his costs; in this Court, the appellant has succeeded on the main question of law, and has been found entitled to a small sum of additional damages, and in the circumstances we find him entitled to one half of his costs in the appeal.

JUDGMENT OF HIS HONOR L. COX.

27th August 1883.

This is an appeal from the judgment of the District Judge of Seychelles. The appellant was plaintiff below, and sued the "Messageries Maritimes Company" in damages for breach of contract, with reference to goods shipped by him or his agents at Marseilles for Mahé.

Damages were asked on the following grounds: 10. Non-delivery of some of the goods shipped, 20. for late delivery, 30. and for damage to the goods.

The District Judge by judgment of 20th April 1883 allowed the appellant Rs 253 in all, and one third of his cost instead of Rs 4,693.78 which the appellant has asked.

The main question before the Court below, and on this appeal, is as to the Company's liability for late delivery. The plaintiff avers that the following goods were not delivered in time:

10. Goods shipped on 27th April 1882, due at Mahé on 19th May and delivered only on 14th August.

20. Goods shipped on 24th May 1882, due at Mahé on 16th June and delivered on 12th and 14th August.

30. Goods shipped on 23rd January due on 24th February, delivered on 11th September, or as the agent of the Company says, on 13th September.

40. Goods shipped on 24th December 1881 due 27th January 1882, and delivered only on 14th August and 7th October 1882.

When the plaint was entered (16th November last) another quantity of goods shipped on 5th August 1882, had not yet been received at Mahé, and the appellant therefore claimed for the full value of the goods.

The case came before the District Judge for the first time on 24th November.

It was then adjourned for three months, and in the interval the goods arrived.

The appellant consented to take delivery of them reserving his right to damages for late delivery—and when the case was resumed, this claim with reference to the shipment of 5th August was reduced to damage for late delivery.

The Company's defence on that part of the case, was founded on a clause of the bills of lading, which they urged exempted them from liability; the clause is as follows:

"The Captain is at liberty to tranship goods at all times, even before starting, on board another vessel of the Company, or even any other vessel, and does not guarantee that there will be sufficient room on board the vessel on which the goods are transhipped. In case there should be no room, and until the merchandize groups or valuables are transhipped, they will be conveyed to stores and stored at the Company's expense, but at the owners risk. The owners or consignees will have no recourse against the captain and the Company for delay resulting from the goods remaining at the port of transhipment."

The company upon this clause contended that the appellant's goods had been left at Aden, because there was not space enough for them on the Mauritius steamer, and that therefore they are not liable for any loss which the appellant had suffered in consequence.

It is to be noticed that the only evidence as to the fact alleged, (i.e. want of sufficient space on the Mauritius steamer) is the statement made by Mr Cheyron, the Company's agent, and he apparently had no personal knowledge of that fact.

The District Judge admitted the defence and gave the following judgment:

"After a careful and minute examination of this case, I have come to the conclusion that the company cannot be held responsi-

"ble for the late delivery at Seychelles of the goods shipped on board their ships. I find nothing unreasonable in Art. 8 of the Bills of Lading, which have been signed by both parties, and which bind them. It was proved by the agent of the Company, that certain goods belonging to L. Deltel had to remain behind at Aden for want of space on the Branch steamer from Aden to Seychelles, and others at Marseilles for want of proper address."

The District Judge however found the defence could not apply to a small quantity of the goods which had been sent by mistake to to Hong-Kong and Shanghai, and he allowed Rs 100 on that head.

I agree with the District Judge that the parties must be held bound by the agreement contained in Clause 8. But the real question appears to me to be, what is the effect of that clause and what did the parties intend by it? It is clear that if the appellant consented that in case his goods were left at Aden month after month, and he suffered loss in consequence, that loss should be borne by himself, and that he would have no remedy against the Company, effect must be given to such a contract, which is no way illegal. But the question is: Did he consent to that? In considering this question, it is I think competent and necessary to bear in mind what the Company's course of business was at that time. They had not then (as they have now) a direct line of steamers from Marseilles to Mahé and Mauritius. But goods shipped at Marseilles for those places were transhipped at Aden, and placed on board one of the steamers plying between Mauritius and Aden, which were timed to meet the Marseilles' steamer at Aden—the shipper of goods at that time must therefore have known that his goods would be transhipped at Aden. He must have known that, as it was a matter of public notoriety, and resulting clearly from the Company's published time tables. He was distinctly informed by a clause of the bills of lading, that there might be delay in forwarding his goods, if the Mauritius steamer was too full to receive them. He was further told that if he suffered loss in consequence, the Company would not be responsible.

The position of the parties was thus just as if the Company told the shippers:

"We cannot take your goods to Mahé by the steamer starting from Marseilles, but we undertake to have another steamer at

"Aden to meet this one, and your goods will then be transhipped. However we do not warrant there will be space in the connecting steamer;—if there is not and delay ensues, we will not be responsible for any loss you suffer."

The shipper assented to this: but I see nothing to show that he assented to what the Company say is the real effect of that agreement, i. e. that his goods might be left at Aden, two, three or five months as actually occurred here, the main obligation of the Company under the bill of lading was to carry the goods to the port of discharge, within a reasonable time; and in order to be able to do so, to provide steamers at Aden of sufficient tonnage to receive the goods, which they agreed to carry to Mauritius or Mahé.

If they failed to do so, and took more goods than their steamers could carry, it seems to me they should bear the consequence, and the loss should not fall on the shipper, unless he has distinctly agreed to bear it.

If there was such an agreement as the company contends, and the shipper consented that in case his goods were left at Aden two, three or four months, or more, the Company could get rid of all his liability saying, our steamers were full; that agreement should have been distinctly inserted in their Bills of Lading. But upon clause 8, I cannot hold that the shipper consented to such an extraordinary condition.

I think the real effect of this clause is this: the shipper agreed to run the risk of losing the first opportunity for conveyance of his goods from Aden to Mahé, i. e. of missing the steamer publicly announced by the Company, as connecting at Aden with the steamer on which he shipped his goods at Marseilles; and if that steamer is full and his goods have been left one month at Aden, I think he has the right of insisting upon their being forwarded by the next following steamer.

Here the goods, as to which there was the least delay, were shipped on 24th May, and should have come by the steamer due at Mahé on 16th June, but did not arrive before the 12th of August:—under the circumstances I am of opinion that there has been a breach of the Company's obligation to carry and deliver the goods within a reasonable time, and that they are not protected by clause 8 of the bills of lading.

There is another defence of the Company with regard to some of the goods late delivered. It was urged that they had been left behind at Marseilles for want of proper labels. We have no sufficient evidence of that fact on the record, and this plea must also be overruled.

I find therefore the appellant entitled to recover from the Company damages for the loss caused by the late delivery of his goods.

For the reasons given by my learned brother, I think the damage should be fixed at Rs 260, in addition to what the District Judge has allowed. To this sum should be added Rs 57.60, as the value of 24 cheeses arrived damaged, and sold by consent of the parties. The sale realised the above amount, or Rs 2.40 per cheese, which is in the hands of the Company's agent.

I think the appellant is entitled to judgment also for that sum.

Upon the whole I think therefore he should have judgment for Rs 470.60, with one third of his expenses below, and one half of his costs upon this appeal.

### SUPREME COURT

#### CLAIM OF LANDED PROPERTY—DAMAGES— PRESCRIPTION OF 10 AND 30 YEARS.

*The plaintiffs in this action, seek to obtain possession of an immovable property in Port Louis, and to recover from the defendants damages to the extent of Rs 2,000 for illegal occupation of the same.*

*It appears that the plaintiffs are the heirs of one Demianée, who in 1819 purchased at the Bar of the Master's Court a portion of land in Port Louis, alleged to be the land which forms the subject of this action. Demianée died in 1819. In the same year, the heirs Kittery raised an appeal against the adjudication to Demianée, this appeal was kept alive by various acts of procedure, but was never prosecuted to a termination, and in 1882, it was declared lapsed (périmé).*

*The defendants first plead that the land they occupy is not the land purchased by Demianée, as it has different boundaries,—so that they purchased it from Poynton*

*Anapa, and finally they plead prescription of 10 and 30 years.*

*The land was ordered to be surveyed by a sworn land surveyor, who identifies it as the land purchased by Demianée.*

*Held that the titles of the defendants were not of such a nature as to allow them to invoke the prescription of 10 years.*

*With regard to the 30 years' prescription, the Court held that prescription did not run pending the appeal against the adjudication to Demianée, but that it had not been proved that those from whom the defendants held the land, were parties to the appeal, and therefore liable to disability as to prescription.*

*The Court orders proof to be lead on these points, and reserves the costs.*

*The Court also decided that the land claimed by the plaintiff is that mentioned in the appeal.*

DEMIANÉE & ORS—Plaintiffs

versus

MOUTOU & WIFE—Defendants

Before

His Honor A. MURE—Second Puisne Judge

and

His Honor JOHN ROUILLARD—Acting Puisne Judge

L. A. HUGUES,—Counsel for Plaintiff  
T. NICOLAS,—Attorney for the same

V. DELAFAYE,—Counsel for Respondent  
F. ROBERT,—Attorney for the same

Record No. 21,844

7th September 1883.

This is an action in which the plaintiffs seek to obtain possession of an immovable property situated at "Camp Malabar" in the Eastern portion of the town of Port Louis, and to find the principal defendants



liable in Rs. 2,000 of damages for the illegal occupation of the same.

The action is raised in the following circumstances. From a "Cahier des Charges" and its appendixes, which are produced in process, it appears that on the 27th of January 1819, one Demianée purchased on the resale by way of "Folle Enchère" a portion of land at Camp Malabar, Port Louis, the limits of which are thus described: "bounded on the north by Tendraya and Malépa upon 15 toises 1 foot, on the east by a street, upon a length of 7 toises and 4 feet; on the south by a street upon 15 toises 2 feet and upon the west by a street, upon a length of 7 toises 2 feet, making an extent of 113 toises four feet six inches."

Demianée died on the 28th June of the same year 1819. In 1840 his heirs applied to the President of the Court of first instance to sell judicially two portions of land belonging to his succession. In 1841 the heirs of Saminaden Kittery, whose property had been licitated in the year 1819, raised an appeal against the adjudication to Demianée in 1819. The appeal was kept alive by various acts of procedure, but was never prosecuted to a termination, but was declared lapsed (*perimé*) on the 22nd November 1882. The action is raised against Marie Jeanne Léontine Moutou and the husband Louis Moutou, as having for many years unlawfully possessed the said piece of land and obtained great profits from it. The conclusions of the declaration are to the effect, that the Court should decree that the said Land formed part of the Estate and succession of the late Jean François Demianée, and now belongs to his heirs and representatives; 2o. and should order the defendant Moutou the wife to quit and leave the said property, and deliver forthwith possession thereof to the plaintiffs, and the other heirs of Demianée; and 3o. condemning the said defendant Moutou the wife to pay Rs. 2,000 of damages.

To this action the defendants have pleaded that the plaintiffs have no right, title or capacity to enter the said action, 2o. that the defendants are not in possession of the portion of land claimed by the plaintiffs, 3o. that by an act under private signatures of date 20th February 1881, Moutou the wife purchased from Poynon Annapa the piece of land at Camp Malabar in her possession, which is described and appears to have different boundaries towards the north from the subject claimed in the declaration, and con-

tains 160 toises of land; 4o. that the defendants along with the previous owners and owners thereof by virtue of regular deeds. In their fifth and sixth pleas the defendants then invoke the ten years and thirty years prescription.

The first procedure in the cause was taken with the view of identifying the land, and a remitt of consent was made to a sworn land surveyor, Mr. Elie, who has lodged a report in process, in which, though their title deeds bear a somewhat different description, he identifies the land occupied by the defendants as that purchased by Demianée in 1819, and as having been conceded on 19th vendémiaire in the thirteenth year of the French Republic to one Pierre Moutou. He having measured the piece of land found it to consist of 117 toises 20 feet, which is partly accounted for by the fact that a wall enclosing the neighbouring property has been built somewhat within its line of boundary. The surveyor rightly considers that the extent of the land and its boundaries are secondary questions, and that the identity of the land was of primary importance. On that point, after considering previous surveyors' reports, and the terms of the original concession, he had no doubt. Further this point has not been contested by the defendants in the argument submitted to the Court, and it may be taken for certain that the land described in the declaration, and that possessed by the defendants, is one and the same portion of land, and therefore the second plea in the defence is not well founded, and falls now to be repelled.

When the case was first heard in Court, and the plaintiff's counsel was explaining their title and affiliation to Jean François Demianée, the defendants' counsel interrupting, explained that he did not deny the relationship of Jean François Demianée to the plaintiffs and his other representatives, who were called as defendants, but that under his first plea in law he maintained he was entitled to take the following objection: that the person who had signed the "Cahier des charges" in 1819, simply signed himself Demianée, and that there was no proof that he was Jean François Demianée, the ancestor of the parties now suing in his right. To this, the plaintiff replied that this special objection could not fall under the general plea of no title to sue. The Court however, held that though it might have been expedient to have put the plea more definitively, it was sufficient to cover this objection, and as the

plaintiff was not prepared with evidence on this subject, the case was ajourned for a few days.

At the next hearing of the case, the plaintiff produced evidence both documentary and verbal, and from which the Court is clearly of opinion that the plaintiffs have succeeded in proving that Demianée was an usher of the Supreme Court, whose Christian names were Jean François and that he sometimes signed his name "Demianée" sometimes "Demianée père," and that these signatures and those of the usher, and that appearing in the *Cahier des Charges*, were all those of one and the same person, Jean François Demianée.

From the evidence thus adduced, and the acts of affiliation in process, the Court has no hesitation in holding that the plaintiffs have a title to sue, and enjoy the capacity which they set forth; as the defendant's counsel, after hearing the evidence did not deny the relationship and the identity of Demianée with Jean François Demianée, the first plea in defence being the objection to title, must be repelled.

The next part of the case calling for attention is the plea of the ten years and thirty years prescription, which the defendants invoke. Before considering these pleas it may be well to set forth as shortly as possible the respective titles of the parties. The first deed founded on by the plaintiffs, is an extract of the original deed of concession under the hand of the Captain General Decaen, dated the 19th vendémiaire in the 13th year of the french Republic, by which he conceded to one Pierre Moutou the piece of land in question, which is described in the same terms and bounded in the same way as in plaintiff's declaration.

The next title is a deed of sale by the said Pierre Moutou, dated 25th April 1806, to Saminaden Kittery of the same piece of ground. Then finally we have the adjudication to Demianée in 1819, contained in the *Cahier des Charges*, to which reference has been so often made. The acts of affiliation complete the title of the plaintiffs and the other parties interested. On the other hand the title of the defendants begins with a document under private signatures registered on the 4th May 1869, by which one Amédée Baudon sells and conveys to a miss Ann Elizabeth Willyse about 160 toises of land at Camp Malabar, the boundaries of which

are set forth as follows: "Bounded on the north by a lane anciently, on the east by a cross road anciently, on the north (sic) by a waste piece of ground anciently and on the west by a lane." After this vague and general description the deed set forth that the said piece of land belongs to the seller in consequence of his having succeeded to his grand uncle, Furcy Lacouture who died in the year 1823. The said land, it is set forth, belonged to Furcy Lacouture by his having acquired it from Mr Louis Alexandre in the month Brumaire an V, and Mr Louis Alexandre was proprietor by having acquired it from the Administrator General of the Island in Vendémiaire year 3, and the seller declares himself to have been the only heir of the said Furcy Lacouture, who was the full uncle of his mother Amédée Lacouture who died 1840. The next deed is an act under private signatures dated 2nd April 1870, by which the said Ann Elizabeth Willyse sells to a minor, Mlle Marie Félicia Anastasia Annapa, Poignon Annapa being her legal tutor, the said piece of land of the same extent and bounded as in the deed of Amédée Baudon. The next deed is one dated 10th February 1881, by which Poignon Annapa sells and conveys to Moutou the wife, the female defendant, the said piece of land of 160 toises. On the same date Marie Félicia Anastasia Annapa, now the wife of Poignon Appou, executes a deed declaring that the sale by Miss Willyse to her, was made in her name during her minority, that she had no right in said sale, nor in the piece of land, and that Poignon Annapa was the proprietor thereof. The plaintiffs called upon the defendants to produce the concession by the Administrator General of the Island referred to in the deed by which Amédée Baudon sold to Miss Willyse the subject in question. No response was made to this call, and the said concession has neither been produced by the defendants nor any trace of it found by the plaintiffs. It ought here to be added, that Jean François Demianée having died a few months after the subject had been adjudged to him, never obtained possession of the property, and the claim is now made by his representatives upwards of 60 years after the date of the adjudication in his favor.

These being the respective titles of the parties and their position in regard to the claim to the property being as above stated, the Court has now to consider the plea of the ten years' prescription invoked by the defendants, that prescription is founded on the well known article of the Code which enacts

"that he who acquires in good faith and by a just title an immoveable subject, prescribes the property of it in ten years." There are, as is well known, two distinct elements in this requirement of the Code, there may be a just title and good faith, or there may be a just title without good faith. The points therefore are distinct and have to be considered apart the one from the other. In the first place as to the defendants' titles it appears to be sufficient in itself; it sells and conveys a certain property for a specified sum, and gives the right of enjoyment and possession of the subject to the person in whose favor the deeds are conceived. The defendants have therefore a title which is "translatif de propriété" and this is held by all the commentators to come up to the requirements of a "juste titre." But we have also to consider and determine the defendants' and her predecessors' good faith in accepting the title. We start here with the fact, that an authentic copy of an original concession in favor of Pierre Moutou, and under the hand of Decaen has been produced and is before us, and we have also the fact that in the deed of Amédée Baudon to Miss Willyse there is a deduction of title given in that deed which is plainly wholly without foundation. There is no such concession in existence as that therein warranted as having been made to Louis Alexandre in Vendémiaire an 3. That statement being fictitious, it is impossible to believe that the succession of names through whom the property passed, Louis Alexandre, Furcy Lacouture and Madame Lacouture or Baudon his sister, has a solid foundation in fact. The defendants have to face the fact that there was a genuine set of titles in existence which negatived altogether the narrative deduced in the deed of Amédée Baudon, and that the least inquiry in the proper quarter would have disclosed the truth as to the deeds presented to them for acceptance, which contain but mere allegations as to previous owners, not one of which could be verified. It is incredible that any one could buy land for a money consideration, without making an investigation into the truth of the concession, and into the facts which are said to have followed in the concession, and without arriving at the conclusion that there was a doubt as to the genuineness of the sellers' titles. If the defendant and her predecessors must have had a doubt on this point, their good faith vanishes, for a doubt implies uncertainty as to the right and whether the predecessor could give a good title. Troplong has well remarked "Pour prescrire il ne suffit pas d'être exempt

"de mauvaise foi, il faut encore être de bonne foi, et la bonne foi est une croyance positive, une confiance entière dans le droit qu'on exerce. Aussi les jurisconsultes qui ont étudié avec les textes, plutôt qu'avec une imagination sceptique, n'ont-ils pas hésité à enseigner que le doute est exclusif de la bonne foi."

With this doctrine we agree, and hold that the defendants cannot validly invoke the prescription of ten years. She however pleads the 20 years' prescription and this point stands in a different position. Good faith is not here an essential element, nay, however the possession commenced, if it has been peaceable, uninterrupted and continuous, with the appearance of proprietorship, that is sufficient to give a right. The defendants moreover have a title which goes back to the year 1819, and there is a presumption that in the absence of positive proof to the contrary, possession has accompanied, and followed upon the title. Prior to that date the defendant has no presumption in her favor, and she will be bound to prove possession.

This right the defendant is entitled to invoke, unless she is subject to a disability, and cannot avail herself of her possession as giving her a right to prescribe in consequence of some act of hers, or an ancestor of hers by whom she may be bound which prevents prescription running in her favor. This, the plaintiff contended, had occurred in this case, that there was a predecessor who was mentioned to the Court by the name of Anastasie, and that as an ancestor of hers had been an appellant in an appeal, which involved the right of property of the immoveable subject in question, prescription did not run during the pendency of the appeal. The Court has carefully considered the evidence bearing upon this matter, and are of opinion that the law can be applied in favor of the plaintiffs in this respect, several matters must be cleared up which at present are in doubt. In the first place the Anastasie who is the predecessor of the defendants, was maintained to be the same person as the Anastasie who was a defendant in the procedure for the peremption of the appeal. In the process of peremption this person is styled Anastasie Amcordon, spinster, heiress of Barbe Cécile Thérésia Kittery her grandmother, who was the wife of Moutousamy Amoordorf, and she is described as the daughter of Louis Charles Lucien Stanislas Amourdorf his father now deceased, but the person to whom Miss Willyse sold the property is a Marie Félicia

Anastasia Annapa, her father being Poynon Annapa. So far as appears these two persons are different individuals. They may be the same persons bearing different names at different times, but that has to be proved. It is true that Barbe Cécle Thérésia Kittery was a party to the appeal of the adjudication of the year 1841, and appears to have continued throughout the proceedings a party in the appeal, but neither of the Anastasies were concerned in the appeal, and if even they are the same persons, it is to be considered whether a disability of that kind will descend to the successors who may have accepted under benefit of inventory, and if they succeeded during minority were bound to do so.

Again it must be made clear to the Court that the subject possessed by the defendants, is that which was undoubtedly claimed in the appeal of the adjudication process. None of the steps of procedure produced, describe the subject, or do more than refer to it, and that only in one instance as a property situate at Camp Malabar. The petition to the President of the Court of first instance, the order of the Court of 19th April 1841, containing a judgment in the case of the heirs Kittery versus the heirs Demianée, contains no reference to the subject. It is clear from deeds in process that the heirs Kittery possessed property in the immediate neighbourhood of the subject in dispute in this process, and to introduce the technical ground upon which the plaintiffs maintained that prescription cannot run, the Court is of opinion that there must be something more than a mere moral certainty, that the subject in dispute in this process is one of the two immoveable subjects, which are referred to as forming part of the succession of Jean François Demianée in the appeal. Properly the subject, which becomes litigious in virtue of an appeal, should be entered and described in the record and documents of the appeal case, so that prescription will not run in favour of the possessor.

The Court therefore appoints the plaintiffs and defendants to lead proof *habili-modo* on the points now indicated, cost reserved.

### SUPREME COURT

INDIAN LAW OF SUCCESSION.—PREPARATION OF A CASE FOR SUBMISSION TO CHIEF JUSTICE OF MADRAS.—22, 23 VICTORIA CAP. 63.

*This is a claim to property left by an Indian trader in this Colony. The Defendants*

*claimed to share the property of the deceased on the ground of alleged community of goods between them and their deceased brother, but this the Court held had not been established. The Court further ordered that evidence be lead, with the view of ascertaining the domicile of the deceased at the time of his death. This point being essential for the purpose of deciding whether the Indian law or the Law of Mauritius should be observed. The Court decided that the deceased's domicile was India.*

*At this stage the Defendants moved to be allowed to prove by parol evidence, that he and his brothers were entitled to a portion of the Estate under the Indian law of succession, this was declined by the Court*

*The point now before the Court is, whether it can safely grant to the Plaintiff her second demand, which is that the Court should declare that the right to the share of the deceased Colandaveloo in the partnership of which he was a member in Mauritius, belongs exclusively to the Minor Palanappen represented by his mother.*

*It appeared to the Court that the evidence before it was insufficient to enable it to decide upon the question submitted, and it therefore decides to order the Registrar of the Court to prepare, under the supervision of the Court, a statement of the facts found by the Court, and of the questions of law arising out of the same, to be forwarded to the Chief Justice of Her Majesty's High Court of Judicature Madras, in accordance with 22, 23 Victoria Cap : 63.*

WIDOW COLANDAVELOO,—Plaintiff

and

APPATOURAY AND ORS.—Defendants.

Before

His Honor A. MURE,—second puisne judge

and

His Honor JOHN ROUILLARD,—acting puisne judge

H. GALÉA, Counsel for Plaintiff,  
W. EDWARDS, Attorney for the same.

V. DELAFAYE,—Counsel for Defendants,  
A. DESVEAUX, Attorney for the same.

Record No. 21,901

7th September 1883.

By a judgment delivered on the 27th July last, the Court ruled that Appatouray and others, co-defendants, who had raised a claim to the share of the late Colandaveloo, their brother, in a Commercial partnership on the ground of an alleged community of goods between them and their deceased brother, had not, for reasons set forth in the judgment above referred to, established their rights. The Court further ordered that evidence be led with the object of ascertaining the domicile of the late Colandaveloo at the time of his death. This point being essential for the purpose of deciding whether, as to the moveable property left by the late Colandaveloo in Mauritius, the Indian law should be observed or the law of this Colony.

After hearing evidence, the Court is satisfied that the domicile of the late Colandaveloo at the time of his death was India. Further, the Court holds that practically, Colandaveloo may be considered as having never intended to reside permanently in this Colony, where he had come to trade. The wife whom he married in India some ten years ago, never accompanied him to Mauritius, his savings made here, were invested in lands and houses in India, where, it is said that he owned more property than in Mauritius, any difficulty on this point was further removed by the admission of the Counsel for Appatouray and ors, that he considered the evidence as to the domicile conclusive.

At this stage of the proceedings however, Appatouray who appeared through Counsel, moved to be allowed to prove by oral evidence that, according to the law of India, he and his brothers were entitled to a portion of the Estate of the late Colandaveloo, not as commoners, but under the Indian law of succession, in their capacity of brothers.

To this course of proceedings the Court cannot give its sanction. In the first place this new position taken by Appatouray and his brothers, does not result from the pleadings. The alleged rights of the defendants being therein based on a deed of community made by the five brothers shortly after the death of their father, and the only question

before the Court having been, whether the community which is alleged to have existed between Colandaveloo and his brothers, gave to the latter a right to take possession of the moveable property which he had in Mauritius, and this question having been already decided of by the judgment referred to, the Court cannot help coming to the conclusion that the motion if given effect to, would have no result to enable the applicants to take the proceedings in this case. For not only was there no authority cited to establish a "prima facie" case before the Court, but being asked by the Court what share accrued to his clients, the Counsel for Appatouray frankly admitted that he did not know. Under these circumstances the Court cannot do otherwise but reject the motion.

The point now before the Court is whether it can safely grant to the plaintiff her second demand, which is that the Court should declare that the right to the share of the late Colandaveloo, in the partnership of which he was a member in Mauritius, belongs exclusively to the minor Palanappen, represented by his mother.

In the conclusions of the "Ministère Public" which have since reached us, doubts are expressed whether the Court is in possession of sufficient evidence, to be able to decide upon a question involving the Indian law of succession, and it is pointed out that Mr Magistrate Hodgson, who was heard on the point, whether on the death of a father, the property devolved on his sons, to the exclusion of his daughters, did not give his opinion as a lawyer, he having never practiced as such.

It seems to the Court that in spite of its desire, not to raise difficulties in the way of suitors, thereby unduly protracting litigation, in presence of the difficulties pointed out by the "Ministère Public," it would be imprudent to accede to the motion of the plaintiff at this stage, and to give an order, which order evidently widow Colandaveloo is desirous of obtaining for the purpose of at once coming into possession of the assets of her late husband, without knowing not only more as to the law of successions, but also as to the extent of the powers of guardians and their mode of appointment, and whether they are dispensed with the obligation of giving security or not.

As it was declared by the learned Counsel for widow Colandaveloo, that it had been impossible to procure any other persons to give

ence of the Indian Laws but Mr Magistrate Hodgson, and a few Indian traders, it was to the Court that the only mode of dealing properly with the questions raised, was by availing itself of the power conferred on Colonial Courts by statute 22 and 23 of C. 63, of obtaining from a Court situated in another Colony the knowledge of the law existing in that other Colony.

It is enacted by the statute above referred to that if in any action depending in any Court within Her Majesty's dominion, it shall be the opinion of such Court, that it is necessary or expedient for the proper disposal of such action, to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominion, it shall be competent to the Court in which such action may depend, to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of jury or other mode competent, such case being approved of by such Court or a judge thereof, they shall settle the questions of law arising out of the same in which they desire to have the opinion of another Court, and shall pronounce an order remitting the same together with the case to the Court in such other part of Her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the question submitted to them in the terms of the act. As the facts of the case have already been found by us, we order that the registrar of this Court do prepare, under the supervision of the said Court, a statement of the facts found by the Court and of the questions of law arising out of the same, and that the case after being so settled, be forwarded at the earliest convenient opportunity to the Honorable the Chief Justice of Her Majesty's High Court of Judicature of Madras, where proceedings shall be held as prescribed by the statute above referred to. Costs reserved.

### SUPREME COURT.

**ATTACHMENT.—COMPETENCY OF JUDGE TO MAKE REFERENCE FROM CHAMBERS.—PERSONAL ANSWERS.—ARTICLES 558, 559 CODE OF CIVIL PROCEDURE.**

*This is a reference from Chambers in the matter of an attachment made by the plain-*

*tiff into the hands of the Municipality of Port Louis and other parties, to secure payment of eight separate sums of money alleged to be due by the Defendant to the Plaintiff.*

*The Defendant in the first place objected to the competency of the Judge in Chambers to refer the matter to the Court, but this objection was overruled.*

*The Defendant then argued that the attachment founded upon six of the sums was null, inasmuch as there was no written title to these, and it was also argued that the claims were not liquid; that in virtue of Articles 558 & 559 of the Code of Civil Procedure, an order of the Judge as to these was necessary in order to effect an attachment.*

*A further objection was made that the provisional valuation by the Judge, had not been made as required by article 559 of the Code of Civil Procedure.*

*The Defendant further contended, that even if the Court ruled that in this case attachments could be made without the order of the Judge, the six claims above referred to being disputed, should be tried by principal action and not by summary process before a Judge in Chambers, and reference by him to the Court.*

*As regards 4 items the objection is sustained by the Court. The Plaintiff moved that the defendant should be put upon his personal answers with a view of obtaining from him the admission of his debt, but this course the Court declined to sanction.*

*The attachment founded on the other two claims are declared by the Court to be null, for altho' it is shewn that they were debts due by Defendant, and paid by the Plaintiff, it was held that the Plaintiff had no written title, and the only action accruing to him is that of negotiorum gestor.*

*There remain two items. In regard to these the Defendant pleaded several grounds of defence in support of which he proposed to call the plaintiff in his personal answers.*

*This was allowed by the Court.*

*Costs reserved.*

**LOUSIER,—Plaintiff**

*versus*

**MONTOCCHIO,—Defendant**

—  
Before

**His Honor A. MURK,—Second Puisne Judge**

and

**His Honor J. ROUILLARD,—Acting Puisne Judge**

—

**V. KIVERN.—Counsel for plaintiff**  
**E. GANACHAUD,—Attorney for the same**

**H. GALÉA,—Counsel for Defendant**  
**P. F. LASTELLE,—Attorney for the same.**

—

Record No. 21,989

7th September 1883.

This is a reference from Chambers in the matter of an attachment made by Paul François Lousier into the hands of the Municipality of Port Louis, and other parties, to secure payments of several sums alleged to be due by Volcy Montocchio to Lousier. The attachment is founded on :

1o. A notarial instrument setting forth a debt of Rs 3,000 by Montocchio to Boullé, which debt was subsequently paid by Lousier, who caused himself to be subrogated in due form into the right of Boullé.

2o. 5 years interest on the same.

3o. An account of Rs 242.18 alleged to have been paid by Lousier for Montocchio to Bertrand & Co.

4o. Two promissory notes amounting in all to Rs 720, subscribed by Montocchio and alleged to have been paid by Lousier for Montocchio.

5o. An account of Rs 40 alleged to have been paid by Lousier to Panisset for Montocchio.

6o. A judgment debt in favor of Chauvin for Rs 242.74 against Montocchio and a bill

of costs relative thereto for £ 4.5.6 alleged, to have been paid by Lousier for Montocchio.

7o. A sum of Rs 95.20 the amount of a judgment obtained by Pastourel against Montocchio, which sum is stated to have been subsequently paid by Lousier.

8o. An account of Rs 80 alleged to be due by Montocchio to one Henri Lousier, and stated to have been paid by Lousier the attaching party.

Galéa objected in the first place to the competency of the Judge in Chambers to refer the matter to the Court, but this objection having been overruled on the Bench, other points were submitted to the consideration of the Court.

It was objected with reference to items 3, 4, 5, 6, 7, 8, that the attachment founded on them was null, inasmuch as there was no written titles as to these, it was also argued that these claims were not liquid ; that in virtue of Articles 558 and 559 of the Code of Civil Procedure, an order of the Judge as to these was necessary in order to effect an attachment, and a further objection was made that the provisional valuation by the Judge had not been made as required by Article 559 C.C.P.

Mr Galéa further contended that even if the Court ruled that in these cases attachments could be made without the order of a Judge, the claims under items 3 to 8 being disputed, should be tried by principal action, and not by summary process before a Judge in Chambers and reference by him to the Court.

As regards 3, 5, 7, 8, the objection is at once sustained by the Court. Item 3 consists of an account due by Montocchio to Bertrand & Co. and a bill of costs relative to the same made by attorney Rodesse. Together with the account is produced a cheque drawn by Lousier on Goudin & Coutanceau, for an amount which does not even tally with that of the account and costs, the cheque does not mention the cause for which it was drawn. Surely this cannot be said to constitute a written title as contemplated by Article 558 Code of Civil Procedure. There having been no Judge's order, the attachment so far as it is founded on this account must be held to be null.

As to the account paid to Panisset (No. 5) no voucher is even produced.

In items 7 and 8, the sums are stated to have been paid "des mains et deniers de Madame V. Montocchio" it may be said that they were really paid by Lousier, but there is nothing before the Court to shew it, and these cannot constitute a ground for an attachment without the order of the Judge.

The learned counsel for Lousier moved however that, for the purpose of supplementing the deficiencies shewn to exist as to the above items, the defendant should be put on his personal answers, with a view of obtaining from him the admission of his debt. To this course of proceeding, the Court cannot give its sanction. Attachment founded on claims which are not liquid, or for which a written title under the hand of the debtor does not exist, are null if made without the interference of a Judge, and no subsequent admission of the party can cure this irregularity.

Turning now to item 4, we find that the claim of Lousier is founded on two promissory notes left blank in the name of the payee, and purporting to be endorsed by C. de Barraut to Lucien Bax, who after they had become due on 24th August 1875, granted a receipt on the back thereof in the words: "Pour acquit des mains et deniers de Mr Lousier aîné". There was no subrogation made by Bax in favor of Lousier. It was contended by the learned counsel for Montocchio, that in this case, the debt of Montocchio to the holder of the promissory note being extinct by the fact of the payment made by Lousier, the action accruing to him was that of a *negotiorum gestor*, and that between Lousier and Montocchio there was no written title, such as to allow under Articles 558 et seq. C. O. P. an attachment to be made without the order of a Judge.

It was represented on the other hand, that although there was no written title or obligation between Lousier and Montocchio, yet the origin of the claim of Lousier against Montocchio was a promissory note subscribed by the latter, and paid by Lousier, and that although Lousier could not any longer sue under the bill, the existence at one time of a written title, was sufficient to allow an attachment to be made without a Judge's order. It was also urged that, in the event of its holding that a Judge's order was necessary, the Court might in this instance stay proceedings in validity of attachment, until judgment of the Court in an action which Lousier was prepared to bring at once against Montocchio on this item.

It seems to the Court, after due consideration, that the claim of Lousier having been made after the very long delay of seven years, and when the payment by him and the receipt in his favor took place after the maturity of the bill, that summary procedure on the bill is incompetent, but that an action would lie at the instance of Lousier against Montocchio on the ground that the former had advanced money on the latter's behalf, in which the receipt would be so far evidence of the truth of the allegation made in such action. Strictly applying this principle of the law, and looking to the fact that Lousier is not the holder of the document of Montocchio by simple endorsement; the Court is of opinion that there is no transference or subrogation in his favor, and, generally agreeing with the argument submitted to us by Mr Galéa, we find the attachment upon these two promissory notes is null, having been made without a Judge's order, and it does not belong to the Court, to order a stay of proceedings for the purpose of allowing a principal action to be brought. Item 6 is a judgment debt of Montocchio to Chauvin, together with a bill of costs, both of which purport to have been paid "des mains et deniers de Lousier" but no subrogation was made in his favor. As to this item as there is no written title between Lousier and Montocchio, and, as the only action accruing to him is that of *negotiorum gestor*, the Court also declares the attachment founded on it, null and void.

The learned counsel for Montocchio raised no objection to the Court going on with the case, in so far as concerned items 1 and 2, and pleaded several grounds of defence, in support of which he proposed to call Mr Lousier on his personal answers. To this an objection was taken, on the ground that his "interrogatoire" would have no other object, but to elicit from him answers in contradiction to sundry written statements embodied in documents to which Lousier and Montocchio were parties; but on principle, when the procedure is regular, any party is entitled to call the other side to an "interrogatoire sur faits et articles;" the only reservation to be made being about the relevancy of the questions put. The Court will therefore allow Mr Lousier to be called on his personal answers, and will resume the hearing of the case at an early date. Costs reserved.



## SUPREME COURT

COMMISSION TO EXAMINE CERTAIN PERSONS  
ON OATH AND ON PERSONAL ANSWERS.

*This is an application for the issuing of a Commission to examine certain persons as witnesses on oath, and certain parties on their personal answers—and was granted by the Court. Costs reserved.*

ROLLAND & PAULY,—Plaintiffs

versus

WEDELÈS & Co. & ORS,—Defendants.

Before

His Honor ETIENNE PELLEREAU,—Acting  
Chief Judge

and

His Honor J. ROUILLARD,—Acting Puisne  
Judge

P. L. CHASTELLIER, Counsel for Plaintiff,  
A. ROLANDO, Attorney for the same.

T. L. JENKINS, Counsel for Defendants,  
A. ROHAN, Attorney for the same.

Record No 22069.

*Judgment on motion for the issuing of a Commission to examine witnesses.*

12th September 1883.

*Mr Justice PellerEAU :—*This is an application for the issuing of a commission to examine certain persons as witnesses on oath, and certain parties on their personal answers.

The application was objected to on the ground that there were certain preliminary questions which might throw out the action

altogether without hearing the witnesses. In order to examine whether the objections which were taken by the counsel were borne out by the pleadings, we have carefully read the plea of the defendant's, and we find nothing to bear out the attitude which has been taken for the first time at the Bar. The first plea is "that the plaintiff has no right title or capacity to enter the action." That certainly is an unmeaning plea which does not show that the plaintiff is not to take the preliminary measures necessary to obtain the evidence on which his action is founded. The first plea in addition "nor can he invoke the law of trade-marks in the present case." The plaintiff has stated in his declaration and also in an affidavit which has been sworn to, that he is the bearer of a trade-mark, and that that trade-mark is registered, and he alleges a breach of his rights in virtue of the trade-mark. That "prima facie" certainly gives him a right of action, and the denial therefore that he can invoke the law of trade-marks in the present case, cannot be supported; unless the plea means something which is latent but not apparent, the plea simply means that he has not the right to invoke the law of trade-marks. There is a trade mark, it has been registered and a breach has been alleged; these facts certainly give to the plaintiff the right of adducing evidence to shew the breach of his right. If the defendant wished to avail himself of the plea which has been put forward verbally at the bar, namely: that the registration has taken place at a certain date, and it is only after that date, that the action can be entered, and with regard to facts occurring only after that date, that should have been specially pleaded. I cannot admit for an instant a vague plea like this, which simply denies generally that the plaintiff can invoke the law of trade-marks. No specific defences as the ones mentioned at the Bar have been stated in the plea, nor are they supported by affidavit, and I must therefore come to the conclusion that there is nothing in that plea to prevent the commission being issued.

The second plea denies certain capacities on the part of the defendants; and says that they ought not to have been sued in those capacities, but the plaintiff has stated that he wishes by the evidence he seeks to obtain, to prove those capacities; and therefore that plea can be no objection to the issuing of the Commission.

The third plea is no bar, whatever to the plaintiff's obtaining the necessary evidence to substantiate his allegation of loss or damage.

If there had been an objection based on a plea shewing clearly that the issuing of the Commission would have been a useless expense, and if that plea were decided in favor of the defendant, the action would have been put a stop to. We should certainly have refused to issue the Commission until that plea had been decided upon, but there is no such plea, and under the circumstances I think that the Commission should issue.

I wish however, to state this, that in the motion paper the application stands "for an order to examine by interrogatories in writing or "viva voce" on oath as witnesses."

I understand from Mr Chastellier that what is meant is this, that the witnesses should be heard "viva voce" on oath, and the parties on personal answers. I have therefore taken the liberty to adapt the motion paper to the application by striking out the words "in-terrogatories in writing or" and the motion as it stands after this alteration is granted.

The costs are reserved.

### SUPREME COURT.

CLAIM OF DAMAGES FOR INJURY TO WINE.—  
PLAINTIFF NOT ENTITLED TO ABANDON  
GOODS UNLESS TOTALLY DESTROYED.

*This is an action for damages consisting in the value of 13 casks of wine shipped for Plaintiffs.*

*An interlocutory judgment has been given by the Court, in which it was ruled that it was for the Plaintiff to shew that a certain amount of the damages done to the goods, did not take place in the lighters when the goods were landed nor on shore, until the moment they received delivery.*

*The Court held that the Plaintiff has satisfactorily proved that the damage to the casks did not occur in the lighter, nor on the wharf, but must have occurred on board the ship and that they have satisfactorily proved the damage.*

*For the Defendant it was argued that the Plaintiffs ought not to receive the full value*

*of the goods, for it was not proved that the wine had been rendered worthless.— Moreover that the Plaintiffs were not entitled to abandon the goods to the Defendant and claim the full value.*

*The Court held that as the goods were not so damaged as to be worthless, the Plaintiffs could not abandon them, but might claim damages for the loss of value they had suffered.*

*Evidence shewed that the wine had been damaged to the extent of Rs. 30 per cask,— and damages at this rate were allowed by the Court with  $\frac{2}{3}$  costs.*

GALDEMAR FRÈRES,—Plaintiff

versus

C. ANDERSEN,—Defendant

Before

His Honor ETIENNE PELLEREAU,— Acting  
Chief Judge.

and

His Honor JOHN ROUILLARD—Acting Puisne  
Judge

W. NEWTON,—Counsel for Plaintiff  
F. VICTOR,—Attorney for the same.

P. L. CHASTELLIER,—Counsel for Defendant  
E. DUUVIER,—Attorney for the same.

Record No. 22,025

25th September 1883.

In this matter an interlocutory judgment has been given by the Supreme Court in which it was ruled that it was for Galdemar frères to shew that a certain amount of damage done to the goods, did not take place in the lighters when the goods were landed, nor on shore, until the moment they received delivery.

This action is one for damages, consisting in the value of thirteen casks of wine, which had been shipped for Galdemar frères.

The first question to be decided by us is whether the plaintiffs have satisfactorily proved that no damage occurred from the moment the goods left the ship, which would necessarily lead to the consequence that the damage had taken place on board the ship. Evidence has been adduced, which may be considered as interested evidence on both sides. Firstly : all the *employés* of the lighterage establishment are concerned in the matter. They have an interest in shewing that the damage did not occur by their fault, and that it was not whilst under their care that the goods were damaged. On the other hand the Captain of the ship and those under him may also be said to be not quite impartial in the matter, but between those two series of depositions, we have the depositions of men who are impartial, men who are employed by the Custom House, and it is I believe, their evidence which should mainly guide us in order to see where the real truth is. Those witnesses say that when the casks were brought on the wharf, there was no oil on the custom wharf. There were no traces of recently spilt oil about the place where the casks were located. One of the witnesses even said he looked into the lighter in which the goods were put, and he noticed no trace of oil, so that the consequence which we may well deduce from that is this : that if the oil had been spread upon the casks it must have been before they left the ship.

On the whole therefore, looking at the evidence, we have come to the conclusion that the plaintiffs have satisfactorily proved that the damage to the casks by the oil did not occur in the lighter or on the wharf, but must have occurred on board the ship, and we have no hesitation in coming to the conclusion that the plaintiffs have satisfactorily proved the damage.

It was argued by the defendant that the plaintiffs ought not to receive the full amount they claim. It was argued that the plaintiffs were not entitled to abandon the goods and claim the full value, because it is not shewn to the Court that those goods were worth nothing, the outside of the casks has been spoilt but it was not proved that the contents were spoilt; the wine may have been good, the value of the articles in bulk may have been diminished, but that is no reason why Galdemar frères should give up the goods. It

may also be said that the goods are not the property of the Captain but really the property of Galdemar, and that there is no law which allows a party to change the ownership of goods and to leave them at another's risk, unless there is such a destruction of their value that they are worthless. The law gives a right to damages, but is there a law which enacts that a party is entitled to leave the goods to the other party instead of claiming right to damages ? We have looked into the authorities and have found in the case of *Oxley* in the 33rd Law Journal, that a party is not entitled to abandon goods which have been damaged, but that he can only claim damages. That is the English Law. But it has also been decided by French Authorities, and those authorities explain the case — that the goods can be abandoned if the damage is so great as to make them unfit for anything, but that they cannot be abandoned if there is only a diminution of their value. By the light of these Authorities I think we can safely come to this conclusion, that in this case it is not shewn that the goods had completely lost their value, the only witness on the point says that the damage is only Rs. 30 per cask, and that is only one fifth of their value, so that we hold in favor of defendant that Messrs. Galdemar are not entitled to abandon the goods, but that they are entitled only to claim the amount of the damage suffered. The plaintiffs have brought forward a witness, and he has been met by no counter evidence, who said that the damage was to the extent of Rs 30 per cask and, we therefore allow Rs 390 as damages at the rate of Rs 30 for each of the thirteen casks.

With regard to the costs, we think they should be Supreme Court costs.

The question that was raised was, whether all the goods should be abandoned, and we think that under the circumstances, on account of the difficulty of the case, the action was properly raised here. But the plaintiffs have not won on all the issues, he has won on the issue which was decided before we took up the case, and also on the question of fact. He is therefore entitled to all his witnesses' costs, but as he loses on the third issue, we think that he ought to have two thirds of the bill of costs with the whole of the witnesses costs.

## SUPREME COURT

**APPLICATION THAT AN ORDER GIVEN BY A JUDGE IN CHAMBERS BE MADE A RULE OF COURT, GRANTED.**

*This is an application that an order by a Judge in Chambers should be declared to be a Rule of Court.*

*The order was to the effect that a certain survey of landed property should take place.*

*The Survey was objected to by the defendant, on the ground that a question of ownership being raised, the Surveyor should not proceed with the survey, but the case should be submitted to the decision of the competent Court.*

*The Court considered that the statement of the Defendant did not clearly raise any question of ownership or possession but seems on the contrary to be an objection to any survey at all.*

*Application granted with costs.*

BERBEYER—Plaintiff

versus

RENAUD & ORS—Defendants

Before

His Honor E. PELLEREAU, Actg. Chief Juge

His Honor A. MURE, Second Puisne Judge

and

His Honor J. ROUILLARD, Acting Puisne Judge

P. L. CHASTELLIER,—Counsel for Plaintiff  
F. VICTOR,—Attorney for the same

H. GALÉA,—Counsel for Defendants  
E. LAURENT,—Attorney for the same

Record No. 22,126.

16th October 1883.

*Mr Justice PellerEAU :—This is an application for the making of an order given by the Judge at Chambers a rule of Court. The order was to the effect that a certain*

line of demarkation between two immoveable properties should be made, the boundaries fixed and every thing done for the purposes of a survey. I have no doubt whatever that when parties consent to a survey being made, if questions of ownerships are raised during the survey, the surveyor should stop, in order that the Courts of Law, the proper jurisdiction, should decide upon those questions; but when, as in this case, the surveyor is appointed by an order of Justice, it may be a question whether the surveyor should stop, when questions of ownerships are raised, and whether those points should not be recorded and signed by the parties and the survey proceeded with to the end in order that all the objections taken should afterwards be submitted to the proper Court. But it is not necessary for us to decide in this case whether such a course should have been followed, and whether the Land Surveyor should have stopped upon a question of ownership being raised, or should record the question and go on with the survey on account of the Judge's order; it is sufficient in this case to look at the objection which has been made, in order to come to the conclusion that the objection was not such as to prevent the Land Surveyor going on with the survey. We have carefully read the objection as drafted and I have no hesitation in thinking, and my brother judges agree with me, that the statement made by the defendant does not clearly raise any question of ownership or possession, but seems on the contrary to be an objection to any survey at all.

We will not say any thing as to what our decision would have been if there had been a question of ownership or possession properly raised upon the face of the memorandum of survey, or clearly made at the time; but we consider that the protest went not so much to a point of ownership as to an objection to the proceedings going on, and this he was not entitled to make. We therefore think that the plaintiff is entitled to move that the order of the judge be made a rule of Court, and that he is entitled to it with costs.

It will be for the defendant afterwards, when the survey is proceeded with, to raise any question of ownership, and to avail himself of any right he thinks he may have.

The application is therefore granted with costs.

## SUPREME COURT

IMPRISONMENT FOR DEBT. — SECRETING OR OTHERWISE DISPOSING OF PROPERTY TO PREJUDICE OF A CREDITOR. — WHAT IS FRAUDULENT SECRETION. — ORD. 16 OF 1869, ART. 6.

*This is an action upon an unsatisfied judgment. The Plaintiff obtained a judgment for rent due by the Defendant, but in spite of his attempts he was unable to secure the payment of his debt.*

*The Defendant was examined in accordance with Art. 6 of Ord. 16 of 1869, as well as witnesses called in the matter, and the Court held that the defendant had secreted money that he ought to have paid to his Creditor. And further that as the secretion had taken place subsequently to the judgment obtained by the Plaintiff, the Defendant has rendered himself liable to imprisonment.*

*The judgment of the Court is that the Defendant be imprisoned for three calendar months unless the debt be sooner paid.*

PAVIE & ANOR—Plaintiffs

versus

RAMSAMY—Defendant

Before

His Honor E. PELLEREAU, Actg. Chief Judge

and

His Honor A. MURE, Second Puisne Judge

W. NEWTON.—Of Counsel for Plaintiff  
H. BERTIN,—Attorney for the same.

Y. JOLLIVET,—Of Counsel for Defendant  
L. WOERNITZ,—Attorney for the same.

Record No. 21,933.

(Unsatisfied Judgment)

JUDGMENT OF HIS HONOR A. MURE

17th October 1883.

*This is an action on an unsatisfied judgment. The plaintiff has obtained a judgment for a debt due by the defendant, he has sworn before a Judge in Chambers that he has endeavoured to realize his debt and has*

*been unable to do so, and that he has reason to believe that the party is secreting or otherwise disposing of his property in fraud of his rights.*

The case is rather of a peculiar nature. It appears that the plaintiff's mandatory had let to an indian of the name of Ramsamy a large house in Port Louis, at a rent of Rs 180 per month. After some time that rent was raised by notice to Rs. 220 per month, and the plaintiff's mandatory alleges that in consequence of that, a feeling of ill will arose in the mind of the defendant, that he continued as his tenant but at the same time he avoided paying him his rent. An action was brought and a decree obtained for the sum of Rs 1815 with interests and costs, being the amount of rent that was due from June 1882 up to the 1st of March 1883. Efforts were made by the seizure of subjects supposed to belong to the defendant, and by attachments, to obtain payment of that sum of money, but unsuccessfully. Among other subjects that were seized there was a "Messagerie" or Livery Stable, which was carried on by the defendant and a man called Coolapachetty, and there is evidence here that they were partners up to the date of the seizure, and immediately upon the seizure, he affected to bring about, or did bring about a separation of partnership, so that the seizure might be held bad. An opposition was at the same time lodged in the hands of the seizing usher, to the effect that this "Messageries" belonged entirely to the partner or to the supposed partner of the defendant Ramsamy, and the matter was not proceeded with.

The question is whether the defendant falls within the provisions of the statute, and I think it is an important consideration to interpret the 6th article of the Ordinance for the abolition of imprisonment for debt. In the first place it directs the procedure which I have indicated, of appearing before a judge in Chambers, of an affidavit there, of a summons to bring the party before the Court, and then it directs that the debtor shall be examined before the Court touching his property, and that witnesses may by leave of the Court be heard on the suit of the debtor or of the creditor. But it goes on further to say, "If the debtor does not attend, or if attending he refuses to make such disclosures as may be required of him by the Court, or if after his examination it appears to the Court that he has secreted or disposed of his property in fraud of the rights of his creditors, the Court may order such debtor to be im-

'prisoned unless the claim of the creditor be satisfied.'

Now the point that I think important and the only question of law in the case, is, what is the kind of fraud and secretion which this statute points at with regard to the rights of the creditor? Is it a fraud or a secretion of property that has occurred before the judgment, or must it be a fraud and secretion of property that occurs after judgment? Both my learned brothers and myself are of opinion that the fraud and secretion, to let in the operation of the statute, must be subsequent to the date of the judgment—that the statute was meant to enable creditors to obtain payment of their rights after they have obtained judgment; and that therefore, the fraud and secretion that is pointed out, must be some fraud or secretion that has occurred subsequent to the date of the judgment.

It is from this interpretation of the statute that the delicacy in applying that law to the facts of the case arises, for, as the evidence which was laid before the Court at great length shews, this man Ramsamy had obtained this lease and had sublet to an enormous number of subtenants, through a long course of time, the collection of rent from these having taken place chiefly before the date of the judgment. Ramsamy endeavoured by every means in his power to refuse to answer the questions put to him as to the position of his affairs, but after enumerating a long list of his subtenants, on the question put by the examining counsel for the plaintiff he had to admit that he had during the last nine months of the lease received Rs. 90, Rs. 100 and Rs. 75 per month, from his subtenants, that is the nature of his own admission made with great difficulty. We have the evidence I think of some 30 witnesses who all came forward stating that they had been tenants of his, and that they had regularly paid their rents to him. There are some half dozen, of these tenants who reveal a very extraordinary state of matters, after the judgment was taken against him, in place of paying their rents to him, Coolapachetty his friend or his partner in the "Messagerie" business went to several of those tenants, some half a dozen, and represented that he had obtained the lease in his own name, and up lifted the rents from him. I must say that I think that the step that was taken between those two friends was very suspicious. Then again these 24 or 30 witnesses shew that a sum of something like Rs. 200 a month came into the hands of this man; that he failed to pay the

principal rent during that time, and that he has not given any account of how he has disposed of this money is another fact of importance in the case. I think he was bound to disclose how he had spent that money; and in default of disclosing how he has spent it, it seems to me we must presume that the money has been in his hands and has been maliciously retained in his hands to destroy the right of his creditors the plaintiffs, and that therefore, notwithstanding the interpretation I have put on the 6th section of this statute, the fraud, or rather, the secreting of the moneys, though begun before the date of the judgment, was continued after the date of the judgment, in short, that there was a continuance of conduct after the date of the judgment which had begun before the date of the judgment.

In addition to that there was an affirmative declaration lodged by partners of his in a vegetable business which they carried on, under which it was found that he had received of Rs 2,698; while these proceedings were going on, that is to say, while the judgment was being obtained and while this rent ought to have been paid, Ramsamy was receiving a sum amounting to that figure from this business of his.

The sums that he has received during the time that the rent should have been paid, amount to no less a sum than Rs. 7,498, and he has failed to pay a debt of Rs 1,815. He has not chosen to explain how he has disposed of this money, and though it is with reluctance that the Court orders any man in his position to prison, yet I do not see my way to escape from the conclusion that this man has come within the provisions of this Ordinance, and that he has secreted money that he ought to have paid to his creditors.

The judgment of the Court therefore is that he shall be imprisoned for three calendar months unless this debt be sooner paid.

JUDGMENT OF HIS HONOR E. PELLEREAU.

17th October 1883.

I agree with my learned brother:—There are two series of cases under Ordinance 16 of 1869 in which imprisonment can be decreed. The first series is to be found in Articles 4 & 5 of the law, and the case in which im-

prisonment may be inflicted according to those articles may be for facts which have occurred previous to the judgment, but with regard to article 6 it seems evident, both from the context of the authority which I am going to mention, and from the context of the law itself, that the fact which is punishable must be posterior to the decree.

Article 6 reads thus :—" It shall further " be lawful for any party who has obtained " any judgment or order in the Supreme " Court, in every case when he shall have " good and substantial reason to believe that " his debtor has the means of paying him, " but wilfully refuses to do so, to make an " affidavit of the fact and to apply to a judge " in Chambers for an order calling the debtor " to be examined before the said Court. If " the said judge in his discretion, thinks " that such order ought to be granted, he " shall issue such order, which shall be served, " personally by an usher specially appointed, " and the debtor shall be bound to appear " before the Court on the day appointed in " the order. The said debtor shall be ex- " amined before the Court touching his pro- " perty and witnesses may, by leave of the " Court be heard on the side of the debtor or " of the creditor. If the debtor does not " attend, or if attending he refuses to make " such disclosures as may be required of him " by the Court ; or, if after his examination, " it appears to the Court that he has secreted " or disposed of his property in fraud of the " the rights of his creditor, the Court may " order such debtor to be imprisoned unless " the claim of the creditor be satisfied."

It was argued that there was nothing very clear in that article to shew that the fraud must be posterior rather than anterior ; but the very context shews that it is only after a judgment has been given, that the proceedings to obtain the imprisonment under that article can be taken, as we have here to deal with imprisonment for fraud, which of its nature is a penalty ; we ought, I believe, to take the strictest sense and to adopt the view that it is for facts posterior to the judgment ; besides the reason of the law is that the judgment is not satisfied, and the fourth line of article 6 enacts that the debtor must have after the judgment the means of paying.

I have looked into the English authorities on the subject, and although I have not been able to find a judgment on the point, I am able to say that in Mr Heywood's book on County Court Practice, it is clearly stated

that the facts for which the imprisonment may be decreed must be posterior to the judgment. At all events we have to deal with a penal law, and judging from the context, applying a strict interpretation, as ought to be applied in cases of this nature, I have come to the conclusion, with my learned brother, that the facts must be posterior to the judgment.

I shall say nothing of the sale of the share in the livery stable, because there was a seizure and the seizure has been abandoned and it is therefore doubtful whether the sale has taken place in fraud of the rights of the creditor, but there is sufficient evidence in the other facts to lead us to the conclusion that after the judgment the defendant must have had money in his possession which he has secreted. He has received large sums. He does not shew how he could have spent all those sums ; and to our minds the sums are so large, that we are necessarily led to the conclusion that he must have had money coming from that tenancy in his possession, after the judgment ordering him to pay the sum—he must have secreted it because he gives no satisfactory explanation about it, and he fully deserves to go to prison. As my learned brother said, the judgment is imprisonment for three calendar months from the date of the execution of the warrant.

The costs of this motion will go against the defendant.

## SUPREME COURT

APPEAL FROM JUDGMENT OF THE ACTING DISTRICT MAGISTRATE OF GRAND PORT.— SALE OF A HOUSE BY A WIFE WITHOUT INTERVENTION OF HUSBAND.— REMOVAL OF HOUSE.— DAMAGES.— RES-JUDICATA.

*This is an appeal from a judgment of the Acting District Magistrate of Grand Port under the following circumstances.*

*The appellant purchased a house from the wife of the Respondent (who was separated from her husband) without the intervention of the latter.*

*This house the appellant sold to one Jean Louis who removed it from the site on which it stood.*

*Upon this removal, Armand, the respondent sued Jean Louis for removing the house,*

*the action was dismissed as Jean Louis was held merely to have disposed of what was *primâ facie* his own.*

*Armand then sued Sènègue, calling upon him to restore the building to its original state, or in default to pay the sum of Rs. 600. The Acting District Magistrate awarded damages to the extent of Rs. 410.*

*From this Judgment Sènègue appeals on three grounds.*

*The first objection raised by the appellant is that the Magistrate amended the plaint and that he was wrong to do so.*

*Held that a District Magistrate may not only so amend a plaint as to bring out clearly the issue, but also amend it even in substance.*

*The second ground of appeal was that of "Res judicata."*

*Held that in the first action brought against Jean Louis the question of title was raised, inasmuch as the Magistrate held that the House belonged to Jean Louis by virtue of the purchase made by him from Sènègue, and that he acted legally in removing it. Further that the question raised in the second action was precisely that raised in the first.*

*Judgment of District Magistrate reversed.*

*Costs divided.*

*The Court also held that the wife (Mrs. Armand) should have been put into the cause.*

SENÈQUE FILS,—Appellant,

versus

ARMAND,—Respondent.

Before

His Honor ETIENNE PELLEREAU,— Acting Chief Judge

and

His Honor JOHN ROUILLARD, Acting Puisne Judge

W. NEWTON,—Of Counsel for Appellant  
L. DESPERLES,—Attorney for the same.

E. GALLET,—Counsel for Respondent  
A. LALANDELLE,—Attorney for the same.

Record No. 786.

19th October 1888.

*Mr Justice PellerEAU :—*In this matter Newton for the Appellant, took three points. The first was that the Magistrate was wrong in allowing the amendment. He quoted the Common Law procedure act, the Rules of the Supreme Court and also the rules of the District Courts. We are not of the opinion submitted by the appellant in this case. We think that there is a great difference between the rule of the Supreme Court and that of the District Court, and that the words : " in substance " which are to be found in the latter give a much greater power of amendment to the District Magistrate than the rules of the Supreme Court as actually existing, give to the Judges of that Court. The reason is obvious—in the smaller Courts the parties apply to the District clerk for their plaints—the cases are of smaller amounts, the parties themselves may not have attorneys, they may not be able to frame their pleadings &c., and the claim has to be put into writing by the clerk, persons often apply to the district clerk without a *procès* and the clerk has to draw up the plaint. The consequence is that the plaint may be very badly drawn up, and this not through the fault of the parties, and therefore it is expedient that the fullest power of amendment should exist. The Court, therefore, thinks that it was fully in the discretion of the District Magistrate to alter the plaint, even when the additional conclusions which had been introduced by that amendment differed from the first conclusions.

For my part, I do not agree with the argument that the latter portion of the rule qualifies the previous part, namely : that portion which enacts that the power exists for the purpose of bringing out clearly the point at issue. I think there is a great distinction between the first and second parts of the rule. In the first part the word " may " is used and the terms are left entirely to the Magistrate, whilst the second member of the rule points out certain cases in which the Magistrate, as well as the Judge of the Supreme Court (for that second part is the same in both rules) is bound to grant the amendment. I consider that a Magistrate and a Judge of the Supreme



Court have not merely the discretion for the purpose of bringing out clearly the points at issue, but that they are bound to do so, provided of course, that the amendment does not go beyond the issue proposed. The second part, in which it is compulsory to amend, is very different from the first part in which broader powers are given by the District Court Rule—and the broader power there given, and left to the discretion of the Magistrate, is not merely to amend so as to bring out clearly the issue, but to amend even in substance. That means that the substance may be altered, and if it may be, it is clear that the original conclusion may be very different from the conclusion as amended. My learned brother and myself agree on the broad point that there was a discretion given to the District Magistrate, that he used that discretion properly, and that having used it the defendant became aware of it. He could have asked for a postponement if he wanted it. He has not asked for it, and on the appeal we do not think we ought to review the decision of the Magistrate on that point.

The second point urged by Newton is that of "*res-judicata*." It was urged by him that on a previous occasion a similar action had been brought, in different terms it is true, but substantially the same. We had some hesitation yesterday on the point, but since then, we have arrived at the conclusion that the argument of Mr. Newton is borne out by the facts of the case, and that he must succeed on that point. The first action which was entered by Armand against Sènèque was for the wrongful removal of certain buildings on a plot of ground, and for damages, because the defendant had done so without right title or capacity and to the prejudice of the plaintiff. We do not see any thing in the plaint which relates to the ownership by virtue of a certain title which was considered to be void or voidable. We do not see exactly in the written plea which was put before the Magistrate, any issue raised by which any such title was invoked, and on which the appellant attacked the title. It was on that account argued by Mr. Gallet, for the respondent, that there was not before the Court a demand having the same object as the second demand, but we are clear that "*res-judicata*" is not merely to be founded on the plaint or on the demand. If a demand is made against a certain party claiming damages for a wrongful act, and the defendant by his plea, verbal or written, or by his argument, according to the practice of the Court, raises the point that he was entitled to do the act which is alleged to be wrong-

ful, and raises the issue which is an issue "*préjudicielle*", a preliminary issue,—it is quite clear that a decision given by a competent Court on that question of title will be "*res-judicata*", although there may be no allegation in the plaint or demand of the defendant having a title or of the title being disputed—otherwise it would be very easy for a party to enter a declaration before the Supreme Court, for him not to mention the title of his opponent, and when the opponent raises by his plea the question of that title and the plaintiff would by his replication put it in issue—the defendant would afterwards say that there was no plea of "*res-judicata*" whatever possible. We have therefore, to ascertain whether in the first case the decision which was given by the Magistrate either expressly or impliedly decided a question of title—and if there was a question of title decided (although the Magistrate might not have considered it himself fully) if the effect of and the construction put on his judgment are that he must have decided the questions of title before he gave judgment as to the damages, it is evident that the judgment as to the damages carries with it a judgment as to the title. Suppose a man enters an action in damages against another for having trespassed upon his ground, and the judgment said that the damages could not be granted because the defendant had a title to the land, it is quite clear that the judgment would decide not merely that there was no right to damages, but no action in damages because defendant had a title. Let us read the judgment in this case :

"The plaintiff asked the Court to find the defendant liable to him in Rs 600 as damages. In order to see whether the defendant is in fault it must be seen whether he had a right to do what he did, viz : to sell the house to Jean Louis, and secondly whether from the facts proved, and in presence of the plaint as is worded, the plaintiff has made out his case. Upon the first branch of the case it was proved that the house belongs to Mrs. Armand that she was separated from her husband, and that she sold the house to defendant, but without plaintiff's authority."

The question of title, therefore, did come before the Magistrate, although it may not have been put on the plea, as is done before this Court, it is quite clear from the judgment and the drift of the defence that the question of title did arise. The Magistrate mentions that the property belongs to Mrs.

Armand, that she was separated from her husband, and that she sold the house to the defendant, but without the authority of the plaintiff, he further says :

“ There can be no doubt, therefore, that when Sènèque bought the house from Mrs. Armand and sold it again to Jean Louis, he had a right to dispose of what was to all appearances his own property.”

Is it not clear here that the very pith of the decision is that Sènèque had bought the house from Mrs. Armand and that he had a title to do what he did ?

“ He may have bought wrongfully from Mrs. Armand, but nevertheless he thought himself proprietor of the house, and could do what he liked with it. It is not astonishing therefore to see defendant in due course of time reselling the house and pocketing the price. Can he under these circumstances, and specially in presence of the terms of the plaint which I have before me, be called upon to pay Rs 600 as damages ?— I think not, for upon the second part of the case it has been proved beyond a doubt that defendant had no part whatever in the removal of a house and illegally converting it to his own use. I think that plaintiff has not made out his case. He proved however that Jean Louis had removed the house, but Jean Louis removed the house because he had paid for it, and thus it had become his property, and he could do with it what he liked. For all these reasons I am of opinion that plaintiff has not made out his case, and that the action which he has entered against defendant has been badly entered. I must accordingly non-suit the plaintiff with costs.”

The Magistrate thought clearly that the plaintiff might be prejudiced by the judgment in right to the property which he alleged, and wanted to have a better opportunity perhaps of vindicating that right and he ordered a non-suit—but the party then moved for a judgment against himself. The first demand was for Rs. 600 as damages for the illegal removal of the property without the right title or capacity. The second demand is for Rs 600 for the illegal removal of a house,— which is identically the same case up to this moment. By an amendment which takes place afterwards it is altered in the following manner :

“ Mr. Hewetson moves that the plaint be

“ amended by inserting after the words : “ rebuilt in another district ” the words : “ whereas, the said defendant alleges himself to be the owner of the said house in virtue of an alleged sale by the plaintiff’s wife without the authority of her husband. Whereas the said sale is null and void or at all events “ NULLABLE ” and again after the words : “ HAVE & DEMAND ” the words “ That the said sale be declared null and void, and that the defendant be ordered to restore the said building in its original state in a delay to be fixed by the Court or to pay him the sum of Rs. 600 as damages ”.

Supposing the defendant does not restore the buildings to their former condition what judgment is asked to be given ? A judgment for damages, and as a fact judgment was given for the sum of Rs. 410 as damages, which is part of the Rs. 600 damages claimed for the illegal removal of the buildings.

What is really the cause of the second demand ?

The practical part of the judgment is the enforcement of the payment of a sum of Rs 410, which is the reverse of the previous judgment. This at once shews that the second judgment went on substantially the same grounds as the first. In both cases it is a demand in damages—in both cases the parties are the same, the capacities are the same, the same question or cause of the demand.

What is really the cause of the second demand ?

It was clearly the illegal removal of the house and the prejudice suffered. After the amendment what was the cause of the demand or issue ? It was a certain title which was invoked by the defendant and was alleged by the plaintiff to be null and void and by virtue of which defendant contended that he acted legally. What is also the real issue on the demand, in the first case. The defendant there had bought a house on a title which may have been wrong, and therefore the Magistrate considered he acted legally in removing it. There is no doubt that the question that was then decided was exactly the question which was afterwards decided, whether there was a title, a good one or not. It may very well be that that question was not taken into full consideration on the first occasion, but it was decided on.

We must come to the conclusion that the two actions are substantially the same ; and therefore the point and appeal must be up-held.

There is another point on which we wish to say something. Whether the wife should have been put into the case, and whether the case on that point, if successful, should be referred back to the Magistrate. We have no hesitation in saying that the wife should have been put in the case. It is true there are authorities of the Court of Cassation to the contrary, but more recent authorities which have benefitted by the progress of discussion are to the effect that the husband does not represent the wife for the bare ownership of the immoveables which are her personal property. We rule that she should have been put in the cause, but it is needless to refer the case back to the Magistrate as our ruling of the point of "res-judicata" carries the whole case.

Therefore, the judgment of the Court below is reversed and judgment entered in favor of S  n  que fils. With regard to the costs there is one issue on which Mr. Gallet was successful; that is, the point of the amendment; but on the third issue as to putting the wife into the cause, he has lost and the costs in those two issues defeat one another and on those we give no costs.

On the point of "res-judicata" which carries the whole case, we think Newton's client is entitled to the costs; and we give him the costs of the appeal and also the costs of the Court below, against Armand.

## SUPREME COURT

ACTION IN DAMAGES FOR DEFAMATION AND LIBEL BY THE EDITORS OF A NEWSPAPER.—GOOD FAITH AND PUBLIC NOTORIETY NO DEFENCE.—ENGLISH LAW DIFFERS FROM THAT OF MAURITIUS—DEFENDANT ALLOWED TO PLEAD THAT THE PUBLICATION MADE WAS TRUE AND FOR THE PUBLIC BENEFIT—ARTICLES 64, 256, 1382 OF THE CIVIL CODE—ORD. 29 OF 1858, ART. 5—ART. 288, 290 AND 295 OF THE PENAL CODE.

*This is an action in damages for an alleged libel published in the newspaper the "Cern  en."*

*The defendants have inter alia pleaded that the facts mentioned in the article published in the Cern  en newspaper were of public notoriety, had been published in several newspapers*

*of the Colony at the time when they were published in the "Cern  en", and moreover the "Cern  en" published two of the said articles merely in answer to a most offensive and insulting letter against some of the defendants published by Plaintiff in the newspaper "La Sentinelle de Maurice."*

*That by publishing the said facts; they were not actuated by any bad feeling or malice against the said Plaintiff, but were on the contrary acting "bona fide" in the discharge of their duties as journalists.*

*That they are ready to verify and will verify in due course of law, the correctness of the facts published in the said paper "Le Cern  en."*

*To these pleas the plaintiff replied that he maintained all the facts, matters, and things in the declaration alleged, and joined issue on the pleas.*

*For the defendants it was argued that the plaintiff could not on this joinder of issue, which is a mere traverse of facts, raise the legal question that the pleas above stated were no excuse or justification in law of the publication made in the "Cern  en". The plaintiff contended that the replication was sufficient to enable him to raise the point, and, in case of need, prayed for an amendment. The Court directed the amendment of the replication.*

*The Plaintiff then contended that the pleas of the defendant, that the occasion and good faith of a publication which is libellous can justify it, were untenable, inasmuch as in the judgment cited by him in support of his pleas recourse had been had to the law of England by tacit consent of the parties, but that the law of Mauritius on the point differed from that of England.*

*The decision of the Court was as follows:*

*All actions for damages are founded upon Article 1382 of the Civil Code and that to support an action the fact should cause injury and be illegal; that if this article stood alone it could not be contended that the publication of truth was illegal, especially in publications touching a breach of the Penal law, in the maintenance of which the community is concerned. But that the Penal Code of the Colony contains penalties and prohibitions, the infraction of which constitute illegal acts, and if they cause a prejudice they may form the subject of actions for damages under Article 1382 of the Civil Code.*

efamation is defined in Article 288 of the Penal Code and punished according to certain distinctions by subsequent articles.

he publications of the "Cernéen" are alleged to fall within some of those articles, and unless there be some enactments by which defamation when true or made under certain circumstances, is removed from the reach of those provisions, the publication must be considered illegal, and if prejudice has ensued damages must be the consequence under article 1882 of the Civil Code.

Viewed by the light of these principles, the pleas abovementioned cannot be supported.

The Court rules therefore that these pleas are no bar to the action, and that the defendants are not entitled to adduce evidence to substantiate them.

There remains the plea whether the truth of the defamatory publications can be pleaded in this case.

Held that according to the law of Mauritius, it is a good defence to a civil action in damages like the present one, to plead that the defamation was true, and that it was for the public benefit that it was published.

No costs to either party.

CORDOUAN—Plaintiff

versus

JARDIN and ORS—Defendants

Before

HIS HONOR E. PELLEREAU—Acting Chief Judge.

and

HIS HONOR A. MURE.—second puisne judge.

W. NEWTON, — } Of Counsel for plaintiff  
V. KVERN, — }  
A. LHOISTE.—Attorney for the same.

L. ROUYLLARD, — } Of Counsel for defendants.  
V. DELAFAYE, — }  
F. ROBERT.—Attorney for the same.

Record No. 21,987

22nd October 1883.

In this case, which is an action in damages for an alleged libel published in the newspaper the *Cernéen*, the defendants have pleaded *inter alia* the following pleas, viz: For their second plea, that the facts mentioned in the articles published in the newspaper *Le Cernéen* were of public notoriety, had been published in several newspapers of this Colony at the same time when they were so published in the said newspaper *Le Cernéen*, and moreover the *Cernéen* published two of the said articles merely in answer to a most offensive and insulting letter against some of the defendants published by plaintiff in the newspaper *La Sentinelle de Maurice*.

For their third plea: that by publishing the said facts in the said newspaper *Le Cernéen*, the said defendants were not actuated by any bad feeling or malice against the said plaintiff, but were on the contrary acting *bonâ fide* and in the discharge of their duties as journalists.

For their fourth plea: that they are ready to verify and will verify in due course of law, the correctness of the facts published in the said paper *Le Cernéen*.

To these pleas the plaintiff replied: that he maintained all the facts matters and things in the declaration alleged, and joined issue on the pleas. It was argued for the defendants by Rouillard and Delafaye, that the plaintiff could not on this joinder of issue, which is a mere traverse of the facts, raise the legal question that the pleas above stated were no excuse or justification in law of the publications made in the *Cernéen*; the plaintiff on the other hand contended that the replication was sufficient to enable him to raise the point, and, in case of need, prayed for an amendment. We think the defendants right in this contention; the objection raised is in the nature of a demurer, and a mere joinder of issue which denies the facts stated in the pleas, cannot be construed to be an assumption of their truth and a denial of their sufficiency in law; but as the legal question raised has been gone into fully and no prejudice will

be suffered by the defendants by the amendment subsidiarily prayed for, we order the replication to be amended to the effect that the pleas above set forth are no bar in law to the action, and that the defendants are not entitled in point of law to raise such pleas as a defence to the action, and we shall presently deal with the costs of this amendment and of the discussion concerning it.

The plaintiff in support of the legal point thus raised by his replication as amended, mainly argued that articles 288, 289, 290 and 296 of the Penal Code of this Colony (Ord. 6 of 1888) regulate the right to a civil action as well as criminal prosecutions, that defamation whether true or false is prohibited by the Penal Code and punished, that the truth of the defamation can be an excuse or justification only when falling under the provisions of article 289 of the Penal Code, and that article 79 of Ordinance 29 of 1853 amends this article only in regard to criminal prosecutions, leaving civil actions for damages under the effect of article 289 above quoted, so that a plaintiff can obtain damages by virtue of article 1382 of the Civil Code, without the defendants being able to plead the truth of the defamation published, or any other circumstances as an excuse or justification. The plaintiff further observed that the fourth plea does not state that it was for the public benefit that the defamatory words were published, and that in consequence this plea does not come within the provisions of Article 79.

Newton and K[ivern] for the plaintiff in support of their argument, quoted the french laws of the 26th May 1819 and of the 25th March 1822. The local proclamations of the 20th April 1820 and of the 11th May 1825, Ordinances 2 of 1832, Article 22, 5 of 1833, Art. 33 of 1836. Dalloz, Presse—Outrage No. 1490, 6 and 7 Victoria 96,— Cassation of the 7th December 1822, Article 5 of Ord. 29 of 1853.

Rouillard and Delafaye in answer contended, that the Penal law of this Colony does not aggravate or diminish the responsibility of a person under Article 1382 of the Civil Code, that the Penal Code does not apply to civil actions, and does not contain any provision concerning the right to, or the measure of, damages; that the plaintiff having applied for leave to prove certain facts, it was the right of the defendants to prove the contrary facts, that the plaintiff by his notice of facts, had waived any objection to that right, and finally that the truth, good faith, and occasion of a publication could justify it, and formed according to the law of Mauritius a

good defence to an action in damages for libel, and that were the pleas merely in mitigation of damages, the defendants were entitled to substantiate them in order that the damages should be properly assessed.

Delafaye further added, that if the fourth plea was deemed insufficient to enable the defendants to avail themselves of the provisions of Article 79 of Ordinance 29 of 1853, he prayed for an amendment stating that the publication was true and that it was for the public benefit that it was made.

Rouillard and Delafaye in support of their contention quoted : Article 8 of the Penal Code, Article 5 of Ordinance 29 of 1853, *Larombière obligations*, 1382, Nos. 2, 28, 45, Laurent 20 Nos. 385 and fol. 464, Sirey cas. 1882 p. 264, Article 3, Code d'Instruction Criminelle, Gilbert, Code d'Instruction Criminelle annoté, Art. 3, Supplément No. 2 and Cass, 1865. 1, p. 426; Esnouf v. Chauvet, Piston, 1862. 138, Boulanger v. Lafite, Piston, 1869. 6, Wright v. L'homme, Piston, 1868. 2, Pearce v. Channell, Piston, 1873. 5, Shellam v. Leal, Piston, 1873, Leal v. Hitié, Piston, 1882.

Newton. in reply, argued that the matter being of public order, there could be no waiver of any right by plaintiff in his notice of facts, that as a fact there was no waiver, that the right of defendants to make a contrary proof could not be construed as giving them the right of making a proof expressly forbidden by law; and he further, on the other arguments in the case, quoted Larombière, article 1382, No. 10, Cass, 1860, page 658 Sirey, Cass. 1866, page 310, Sirey, Dalloz Presse, No. 1536, Dalloz Loi, No. 539, 542 and fol. Cass. 26 April 1821, Dwarria, p. 533, 14 and 15, Victoria 99, 6 and 7 Victoria 96, s. 6, 3 Russell on crimes, Art. 5 of Ord. 29 of 1853.

#### JUDGMENT

We shall at the outset deal with the questions whether the plaintiff has by applying for leave to prove the circumstances set out in his notice of facts, waived any right to raise the legal point which has on both sides been so fully and ably argued; and whether the right to make a contrary proof by oral testimony under Article 256 of the Code of Civil procedure, or article 64 of the rules of Court, implies a right to make proof forbidden by law.

It will be well to clear the ground of these

points—a notice of facts has for its object to obtain leave to adduce oral testimony in support of an action, or of some defence to it; it proposes to substantiate a demand, a plea, or a replication; and it is not easy to admit that any right which the plaintiff may have on the merits of his case, has by his own attitude been taken away from him, unless the renunciation to the right appears clearly from the document from which it is sought to be deduced. We fail to see such a waiver in the application made in this case by the plaintiff for leave to prove facts it does not result from the nature of the proceeding, nor from its wording; the proceeding is a preparatory one, meant to procure at the trial the necessary evidence in support of the declaration and of the plaintiff's action, and is in no way a relinquishment of his right which he maintains in his replication as well as declaration. Nor can we construe this proceeding and its wording, as giving to the defendants the right of proving the truth, good faith, and occasion of published defamation, in bar of the action or in mitigation of the damages, if the law takes away that right. The Code of Civil procedure, article 256, and article 64 of the general rules and orders of this Court, have meant to avoid the costs of a special application on behalf of the defendants for leave to rebut by oral testimony the evidence adduced for the plaintiff. They deal with procedure, but do not confer a right under the common law if that right is taken away by it. We therefore dismiss the objections above mentioned without it being necessary to inquire if they, or the exception taken by the plaintiff, are of public order or can be waived. We deal below with the costs consequent on this discussion. We now come to the more important questions whether the occasion, good faith, and truth of a publication which contains a defamation, can be pleaded in answer to this action, and proof thereof can be allowed to justify or excuse it, and to what extent the 2nd and 3rd pleas are founded on the occasion and good faith of the publication, the fourth plea is based on its truth.

We shall first deal with the 2nd and 3rd pleas, that is with the question whether the occasion and good faith of a publication which is libellous can justify it.

It will be observed that many cases cited by Delafaye for the defendants from Piston's and Sauzier's reports, support the position that the law of England has been resorted to as a guide to the Courts of law in Mauritius, and it was argued that by the law of England and by vir-

tue of the above cases, truth and the occasion of a publication could be pleaded in justification, but it is contended for the plaintiff that the points now raised by him were never taken in those cases, where recourse was had to the law of England by the tacit consent of parties, and that in consequence they could not form precedents by which this case can be decided. This contention of the plaintiff is quite correct, the points being taken, we have to decide according to the law of Mauritius, whether the contention of the plaintiff and defendants on this part of the case is right or wrong, and to ascertain what that law is.

There can be no doubt that article 1382 of the Civil Code is the foundation of all actions for damages like the present one; to support an action under it, it is necessary that there should be a fact causing an injury or detriment, that that fact should be illegal and that it should be by the commission or omission of the party sued. If that article stood alone in our law, it could not be contended that the publication of truth is illegal; courts of law left to their sole powers of reasoning, could not construe the truth to be an illegality, especially in publications touching a breach of the penal law in the maintenance of which the community is concerned; and those Courts might well seek in the circumstances of each case, for an excuse or a justification of the publication; the occasion on which the matter is published, its truth, the good faith and propriety with which the publication is made, are all circumstances which they might well and should consider, if they had to apply article 1382 by itself.

But the Penal Code of the Colony contains penalties and prohibitions; the infractions of that law constitute illegal acts, and if they cause a prejudice, may form the subject of actions for damages under Article 1382. There is no doubt that what that Code prohibits and punishes, would be an illegal act under the provisions of this article.

Laurent vol. 20 page 419 of his work on "Le Droit Civil Français" writes: "Que les faits punis par une loi pénale soient des faits illicites, cela va sans dire, toute infraction est donc un délit civil pourvu qu'il en résulte un dommage." Now the Penal Code of this Colony has defined and punished defamation, and thereby prohibited it, except under certain circumstances; this enactment makes it illegal, and makes it illegal within the limits in which it is punished by the Penal Code, or any subsequent enactment,

We could not countenance the argument, that the prohibitions of the Penal Code are not to be considered as prohibitions in a civil suit. It is true that by Article 5 of Ordinance 29 of 1853, actions for damages are separated from criminal prosecutions, and that the verdict of the jury in the one case cannot affect the decision in the other. It is also true that by Article 8 of the Penal Code, condemnations to the punishments which it enacts, are without prejudice to the damages which may be due to the parties, but this right to damages exists under article 1382 of the Civil Code by which it is regulated, and the article of Ord. 29 of 1853 referred to, does not prevent this important consideration, that an act prohibited by the criminal law is essentially an illegal act; whether the consequence to be applied to it be a criminal penalty, or compensation in favor of a person who has suffered by it, it must be looked upon as contrary to law, and it is illegal. Recourse must therefore be had to the Penal laws, to ascertain for the purposes of the Civil action in damages, what and when defamation is prohibited, and constitutes an illegal act.

Defamation is defined in article 288 of the Penal Code, and punished according to certain distinctions by subsequent articles of the same code. The publication made by the *Cernéen* is alleged to fall with the provisions of some of those articles, and unless there be some enactment by which defamation when true, or made under certain circumstances, is taken away from the reach of those provisions, the publication must be considered as an illegal act; and if prejudice has ensued, damages must be the consequence under article 1382 of the civil code.

To ascertain with precision, the extent to which the enactments of the Penal Code have allowed defamation to pass unpunished and unprohibited, as an exception to articles 288, 290 and 295 of that Code, it is necessary to refer to article 43 of that law which reads as follows:

"No crime or misdemeanour can be excused nor the punishment be mitigated except in the cases and circumstances where the law declares the offence excusable or permits the application of a punishment less severe."

Now defamation is a misdemeanour, as a consequence of what precedes, it is a civil as well as a criminal *délit*, and to the extent that it is inexcusable in the penal laws, it is

an illegal act, and as such the foundation of an action for damages under article 1382 of the Civil Code.

Viewed by the light of these principles, which result from a strict construction of the law, the second and third pleas of the defendants cannot be supported, the facts which they mention are not allowed to be an excuse or justification to the publication of libellous matters, the occasion, the absence of express malice, the previous publication of the matter by other papers, the duties of journalists or publicists, all these are not acknowledged by the Penal Code as an excuse or justification, of the publication; it remains therefore a prohibited and punished act, an illegal act, and if prejudice has ensued from it the author of it is liable in damages. There are it is true authorities in the french jurisprudence to the effect that good faith is a good defence to a prosecution, and as a consequence to an action, but it will be noticed that in France the law of defamation is a special one, and is not like that of Mauritius part of a Penal Code, in which it is laid down that no excuse will be admitted unless expressly allowed by law, and if a publication made wilfully is punishable and illegal, there seems to be no reason why the damage which arises therefrom should not be compensated for because the author may be of good faith; good faith does not prevent the act from being illegal, and the injury from having been caused, and therefore damages are due under the express enactment of article 1382 of the Civil Code. Chassan mentions in Vol. 1, page 129, a decision of the Court of Assizes which has "*refusé l'audition de témoins moins demandés par l'éditeur d'un ouvrage pour prouver sa bonne foi*" with this we agree by virtue of article 43 of the Penal Code. We therefore rule that the 2nd and 3rd pleas are in law no bar to the action, and that the defendants are not entitled to adduce evidence to substantiate them.

It was argued with great force for the defendants from a decision of the Court of Cassation of 1882, that the facts mentioned in the 2nd and 3rd pleas could be proved in order to show that there was no fault on the part of the defendants.

We cannot agree with this argument, it will be observed that a distinction is made by that judgment, between the truth of the libel and circumstances which might tend to show that there was no fault on the part of the defendants; if the judgment means that there

are circumstances which may render the publication legal, altho' they are not specially enacted by the law to be an excuse to the publication of a libel, we cannot agree with it, because article 43 of the Penal Code is clear on the subject; beyond the limits of any express exception, defamation is prohibited and illegal, and whoever wilfully publishes it or republishes it, commits a fault; but if the judgment means, as we believe it does, that no action lies when the repetition of the defamation has given rise to no prejudice, when the damage, if any there be, has arisen from the previous publication made of the defamatory matter by the party himself who afterwards complains, and when therefore is no "*faute donnant lieu à une réparation* committed by the defendant, then we agree with the judgment quoted; it falls within the principles of article 1382 which requires that the defendant should be the author of a damage and that there should be damage. We do not think therefore that this decision is contrary to the mode of reasoning which we have adopted, and by virtue of which we have ruled that the second and third pleas cannot be supported; these pleas do not allege that no prejudice was caused or that the defendants were not the authors of the damage suffered. It has further been argued for the defendants that the facts stated in the pleas last cited could be proved in mitigation of damages, and that if they formed no justification of the publication, they were a proper subject for the consideration of the Court in the assessment of damages, several authorities were referred to as supporting this proposition. But we cannot agree with it, if the publication is a misdemeanor, and, as we have established, an illegal act, the damage which it causes should be fully compensated,—excuses which do not palliate the offence and are admissible in no wise to diminish its illegal character, cannot therefore interfere with the consequence drawn from article 1382 of the Civil Code, that the author of the illegal act is obliged to pay an indemnity for the damage arising therefrom—the prejudice exists notwithstanding the facts alleged as excuses, and as it results from an illegal act, the character of which is not affected by these excuses, they cannot have any influence on the amount of damages.

We therefore rule that the 2nd and 3rd pleas cannot be substantiated, either in justification of the publication, or in mitigation of damages. The costs on this discussion will be dealt with here below.

It was urged that one of those pleas showed

that the libellous matter had been published for the public benefit; but we cannot give that sense to any of them.

There now remains the question involved in the fourth plea, whether the truth of the defamatory publications can be pleaded in this case.

We have already referred to article 43 of the Penal code which, taken in connection with the articles defining and punishing defamation, whether true or false, produces the result that the publication of a libel is an illegal act unless allowed by some express enactment. Now with regard to the truth of the publication, there is such an enactment in the Penal code; article 289 runs thus:

"Nul ne sera admis à prouver la vérité des faits injurieux ou diffamatoires autrement qu'à l'appui de la dénonciation qui aura été faite au Ministère Public de crimes ou de délits."

If there should be a crime or misdemeanor committed, and it should be denounced to the public prosecutor, publication may be made of facts stated in support of the denunciation; it is not alleged in the fourth plea that such is the case here, and were we left to the Penal Code itself, we should have no hesitation in holding that in this action, the truth of the matter published cannot be pleaded, but it has been rightly contended for the plaintiff, that although article 289 of the Penal Code assumes the shape of a law of evidence and procedure, although it seems merely to give a right of defence in certain cases, it is nevertheless a law which affects the right of publication itself, and makes publication of defamation illegal, unless it has taken place under the circumstances stated by that article.

This is true, but it is none the less true, that although it involves a prohibition of what it does not expressly allow, it assumes the shape of a law which deals with a right of defence, with evidence, and it has the garb of a law of procedure, it has been said of the french law of 1819, its parent law, that it was a law of criminal procedure, (see Chassan délits de la parole Vol. 2 page 490) and it certainly has not lost that character by its insertion in an ordinance, the object of which is, according to its title, to establish a penal code for Mauritius and its dependencies; its insertion in that law and its wording, give it the form and character of an enactment concerning criminal procedure, although like many laws on



procedure it may involve a right or the deprivation of a right, under those circumstances it may well be considered to have been repealed by a subsequent law touching criminal procedure, which should involve a contrary principle.

It is contended for the defence that a subsequent law exists, which had that effect to a certain extent, and we have been referred to article 79 of Ordinance 29 of 1853, the scope of which we have now to ascertain.

The object of that Ordinance is to amend and consolidate the laws on criminal procedure; the enactments which it contains are *prima facie* laws of procedure and there is nothing in the wording of article 79 which takes away from it the character stamped upon it by the general aim of the law, its wording on the contrary confirms that character.

But there can be no doubt that under the form of procedure and evidence it involves a most important principle; it enacts that a party charged with the publication of a personal libel may plead the truth of the matter charged, and that it was for the public benefit that the matter has been published, its consequence is that the party brought within its provisions cannot be punished, that the penalties enacted by the Penal Code cannot be inflicted upon him, and that the act which would be a misdemeanour under the Penal Code, considered by itself, ceases to be an offence within the limits of article 79, that is, when the publication is true and made for the public benefit.

We must bear in mind that by Ordinance 11 of 1869 prosecutions for libel can take place only before the Court of Assizes; and if before that Court, its publication is justifiable under certain circumstances not allowed by the Penal Code, this code is thereby modified, and defamation instead of being a prohibited and illegal act in accordance with its provisions, becomes unprohibited and legal to the extent that it can be justified under art. 79, there is nothing unusual in the fact that a law which appears to be an enactment of procedure but contains a serious principle, should repeal a previous law which involves a contrary principle under the garb of procedure, here the conflict between the two laws is evident; that which the Penal Code punishes ceases to be punishable, the prohibited act disappears the publication becomes lawful, it becomes lawful for the purposes of article 188

as well and the civil consequence of damages cannot be drawn by virtue of this article.

Thus article 79 of ordinance 29 of 1853 like article 289 of the Penal Code, although apparently law of procedure and evidence, is substantially a law which affects the very right of publication, and renders a publication which is true and made for the public benefit, a lawful act for all purposes. We therefore find that according to the law of Mauritius, it is a good defence to a civil action in damages like the present one, to plead that the defamation was true, and that it was for the public benefit that it was published.

It will however be observed that the fourth plea of the defendants is incomplete; it may be taken as an assertion that the facts published were true, but it contains no allegation that it was for the public benefit that they were published. From the full discussion which has taken place before us, we think that no prejudice will be caused by allowing an amendment, which will place the plea in complete conformity with article 79, and we in consequence, order that an addition be made to that plea, to the effect that the facts were true and that it was for the public benefit that they were published.

As each party has had to move for an amendment, we consider that no costs should be granted on the amendments, the plaintiff has won on the 2nd and 3rd pleas which were both ruled by the same principles, and on the question of waiver by the notice of facts; but the defendants have won on the very important point founded on the fourth plea; we therefore consider that the costs should be compensated and that none should be granted.

The questions which remain to be decided in the case being mainly issues of fact, it will be for the parties to consider whether they should not be tried by a jury.

### SUPREME COURT

APPEAL AGAINST DECISION OF ACTING SENIOR DISTRICT MAGISTRATE.—JUDGMENT FOR TAXES AGAINST FATHER, TO BE MADE BINDING UPON HIS CHILDREN, WHO ARE CO-OWNERS OF A LANDED PROPERTY WITH HIM.—“*DÉCLARATION DE JUGEMENT COMMUN*”.—RULING OF MAGISTRATE SUSTAINED.

*This is an appeal from a decision of the Acting Senior District Magistrate.*

*On the 22nd May 1884, at the suit of the Municipality the Magistrate delivered a judgment ordering Félix to pay the sum of Rs. 842.70, being the amount of Direct Taxes and water rent due by him on account of his property, in Port Louis, from 1870 to 1882.*

*The Municipality in order to obtain payment of the amount for which they had obtained judgment, caused the property in question to be seized, but the seizure was set aside as null and void, as the property belonged partly to Félix, and partly to his Children as heirs of his late wife.*

*The Municipality then moved that the judgment delivered against Félix should be made binding upon the heirs of his deceased wife, the Magistrate dismissed the action.*

*From this decision the Municipality appeal.*

*It appears that the action was for taxes which ran from 1870 to 1882, whereas the predecessor of these children died in 1869, the claim against the children was not consequently a claim against the deceased.*

*The Court held that the object of the plaintiff entered by the Appellants was to make the children liable as heirs of their mother, whereas the action should have been a direct action against them as being proprietors.*

*The Ruling of the Magistrate is sustained with costs against the Appellant.*

—  
THE MAYOR & THE MUNICIPAL  
CORPORATION OF PORT LOUIS

Appellants

versus

FÉLIX & ORS.—Respondents

Before

His Honor E. PELLEREAU,—Acting Chief  
Judge

and

His Honor A. MURK—Second Puisne Judge

L. ROUILLARD,—Counsel for Appellants  
E. LAURENT,—Attorney for the same

V. DELAFAYE,—Counsel for Respondents  
A. J. COLIN,—Attorney for the same

—  
Record No. 791  
—

JUDGMENT OF HIS HONOR E. PELLEREAU

—  
25th October 1883.

In this matter the plaintiff is to the following effect : that a certain judgment " given by " this Court on the 22nd May last on behalf " of the said plaintiffs versus Julius Félix alias " Clémentia be declared binding upon the " heirs and representatives of the late Louise " Dorcilie Mondor Sparon the deceased wife " of Julius Félix alias Clémentia, and that " they be condemned jointly with the said " Julius Félix alias Clémentia, to pay to the " said plaintiffs the sum of Rs 842.70, being " the amount of an account for direct tax and " water rent, due by defendants' property " situate in Port Louis Great Salt Pan street " No. 8, from the year 1870 to the year 1882, " with interest and costs."

The defendants could clearly see on the face of the plaintiff, that what was asked of them was not merely a condemnation in taxes due by them, or in a certain share of taxes due by him, but they were also sought to be bound by a certain judgment given before they had given any notice of the action against them. They took the objection that such an action was not competent, and that no action for " déclaration de jugement commun " in a case like this could be considered as regular. True it is the notes in the Court below might have been clearer, but after the explanations of both parties, and after looking at the notes carefully, I think the point I have just mentioned was really taken in the Court below, and was the point meant to be decided by the Magistrate. Delafaye took a preliminary objection to the procedure as the defendants were not a party to the first action, and could have no cognizance of the matter at issue, and he moved that the plaintiffs be nonsuited, which means that his clients could not be bound by a case which had not been entered against them, on facts which had not been

notified to them ; in fact when they did not know anything that had taken place. The question raised before the Magistrate and here on appeal is therefore this : Is this a case in which a "*déclaration de jugement commun*" could be obtained ? Authorities have been quoted by Rouillard for the appellants to this effect, that whenever an intervention or a "*tierce opposition*" is allowed, such an action as a "*déclaration de jugement commun*" is competent.

The principle I believe is good, but the case now under consideration is not one which an intervention would have been allowed if the matter had come before this Court, the intervening party having no interest in doing so. A "*tierce opposition*" takes place in a Case where the parties although not legally bound by a suit, would nevertheless be practically affected by the judgment if given against the parties in the suit ; for instance, if the judgment is that Land A belongs to a certain person, as against another person, and the plaintiff is put into possession of it, and that Land belongs to a third party who has not been privy to that judgment, the execution of the judgment would affect the third party practically, and that third party has therefore a right of attacking it by "*tierce opposition*". The plaintiff may very well call upon a party having such a right for a "*déclaration de jugement commun*". Again when there is an interest such as to justify an intervention, the party can interfere, and he can at any time afterwards say the judgment does not affect his interest, and the plaintiff can also call on him for a "*déclaration de jugement commun*". But in this case how could the parties be affected by the judgment legally in its practical effects, I am at a loss to see ? A judgment is given against Félix after the dissolution of the Community, and against him alone, it does not therefore legally bind the heirs of Mrs Félix.

The property which that judgment can be enforced against, is only the property of Félix, and if Félix is holding a share of an Immoveable, the whole Immoveable cannot be seized, the proof of it is that when an attempt was made to do so, it was set aside as being null and void, it was therefore such a judgment as could not affect the heirs either in law or in fact. Why then, if those parties have nothing whatever to do with the judgment, why should they be sued in order that they should be bound by the judgment, why should they, having no interest in a certain thing, be called before the Court to have something to say in

that thing ? The Magistrate has therefore been right in his decision, he had power to amend in substance or in form, but the amendment was not prayed for and he did not grant it,—if we were here to upset the judgment and grant an amendment, the consequence would be this, that we should have to give the Costs against the appellants, because after all, it was the fault of the appellants, and the amount of costs would be exactly the same as if a nonsuit had been ordered to be entered, with the disadvantage of proceeding with a plaint perhaps insufficient in other respects. We think that the ruling of the Magistrate cannot be interfered with ; but on the other hand Delafaye has not at all objected to there being a certain variation in the judgment, in order that full justice should be done to the parties by restoring the judgment of nonsuit, I think the ruling of the Magistrate should be confirmed by this Court, and that a nonsuit be entered with costs in the Court below instead of the judgment appealed from—the costs of the appeal to be borne by the appellants.

#### JUDGMENT OF HIS HONOR A. MURE :

I am of the same opinion and for the reasons which I shall state very shortly : It appears there is a property here of which the proprietor was supposed to be entirely a certain Mr Félix. An action was raised against him and decree given on the 22nd of May last in a sum of Rs 842,70 c.

It turned out that he was not the sole owner of the property but that he was the owner only of part of it, his children being the owners of the rest. The action was for a sum of taxes which ran from the year 1870 to 1882, while the predecessor of these children had died in the year 1869. It is perfectly clear therefore that the claim against the children was not a claim against the deceased in any sense, it was not because of any obligation due by their ancestress that they were liable, but an obligation due by them directly, they being the owners of the property, though they were minors and though they had been heirs of this person ; it was because of their having inherited the property, and having held it in their own right, that the obligation to pay taxes arose against them. That being the position of the matter, on the property being seized in the name of Mr Félix, that seizure was declared to be null by the Master of this Court and another action was raised. I think it is very clear that if the terms of that action be looked

at, the whole object of it was to make the children liable *qua* heirs of their mother, along with the head of the community, as it were. That was the purport of this action, and the sole purport of it. It was perfectly clear that the action was for the purpose of making these persons liable as heirs and *qua* heirs along with the principal party, whereas the action should have been a direct action against them, they being proprietors. And it is now said that the plaintiffs are entitled to have a "déclaration de jugement Commun" I need add nothing to what my learned brother has said on that subject, I agree with him entirely that is not at all a case for a "déclaration de Jugement Commun" but is a joint liability or perhaps a several liability, in so far as all the parties are proprietors of the same property.

It is a different thing entirely to having what one may call a decree conform to a previous decree, it has nothing to do with the previous decree. It may be necessary to recite the previous decree, and the facts contained in the previous decree, but the remedy in this case was a mistaken remedy and therefore the judgment of the Magistrate is right. At the same time it is perfectly clear that the action might have been amended, but the amendment would have been so great that it would have been just as expensive as to have begun a new action. The proper course to have been followed by the Magistrate was to have given a nonsuit, in order that questions might not be raised in reference to this action in the second action, and therefore I quite agree, for the grounds I have stated, that this judgment must be varied to the effect that the plaintiffs be nonsuited, but the costs will fall upon the appellants.

The ruling of the Magistrate is sustained—a judgment of nonsuit with costs there to be entered in the Court below—the costs there to be borne by the plaintiffs, and the costs of the appeal to be borne by the appellants.

Costs to be distracted in favor of Mr attorney Colin, who affirms that he made the larger part of the outlay.

### SUPREME COURT

**ACTION FOR RECOVERY OF RENT UNDER A VERBAL LEASE, OR DAMAGES FOR ILLEGAL USE AND OCCUPATION OF PREMISES.—WHAT IS A COMMERCIAL LEASE.—IS IT PROVEABLE BY ORAL TESTIMONY.—ARTICLE 6 OF ORD. 15 OF 1881.—ARTICLE 632 OF CODE OF COMMERCE.**

*The plaintiff prays for a judgment condemning the Defendant to pay a sum of Rs. 1165*

*as damages for having illegally used and occupied certain premises from 1st January 1882 to 31st July 1883: and that the Defendant be ordered to quit the premises.*

*Previous to this, the Plaintiff claimed rent for these premises at the rate of 55 Rupees from 1st January to 1st December 1882, and 80 Rupees per month from the last date to 31st July 1883, and in case the lease between the parties be denied by the Defendant, the Plaintiff makes the prayer first mentioned.*

*It appears that the Defendant was tenant of the premises in question up to 1st December 1882 at a monthly rent of Rs 55, and before that date a notice was served upon him by which he was ordered to quit the premises on the last mentioned date, or to pay rent at the rate of 80 Rupees per month; the Defendant continued to keep the premises, and alleges that he was allowed to remain at the rate of Rs 55 per month, and that there was a waiver of the notice, this was denied by Plaintiff.*

*The Defendant argued that under Article 6 of Ordinance 15 of 1881, the Plaintiff's claim was barred to one year's rent, as this was a Civil Contract, and the lease was not fully established by writing; that in fact the only claim that Plaintiff could make was one for indemnity, not for rent.*

*The plaintiff replied that Article 6 of Ordinance 15 of 1881 applied to cases in which oral testimony was not receivable—that this being a commercial lease could be proved by oral testimony and therefore did not come within the terms of the above Article.*

*The Acting Chief Justice held that Article 6 of Ordinance 15 of 1881 applied to cases in which oral testimony was not formerly receivable to prove a lease—and therefore did not apply to commercial leases. That a debt for rent of a shop is a commercial debt. He considered the plaintiff was entitled to judgment as prayed.*

*Mr. Justice Mure held that this case must be brought entirely within the operation of Art. 6 of Ordinance 15 of 1881, which applies to all leases whether Commercial or Civil—That the plaintiff can only recover for the year preceding the raising of summons, to the day of judgment,—that rent should be allowed at the rate of Rs. 55 per mensem only.*

*Mr. Justice Rouillard, considers that the lease of the shop by the Defendant, even if it were*

*taken by him for the purpose of his trade, does not constitute an "acte de commerce" and cannot be proved by witnesses, that the plaintiff in the absence of a written lease, can only recover for use and occupation of the premises for one year, and in addition, the time that has elapsed since the entry of the action. Further that the rent should be calculated at the rate of Rs 55 per mensem.*

**CASSIM MAMOOJEE LANGREE—**

Plaintiff

*versus*

**MEERZA CHUTTOO—Defendant**

Before

**His Honor E. PELLEREAU, Actg. Chief Judge**

**His Honor A. MURE—Second Puisne Judge**

and

**His Honor J. ROULLARD, Actg. Puisne Judge**

**H. GALÉA, —Counsel for Plaintiff**

**W. EDWARDS, —Attorney for the same**

**A. HUGUES, —Counsel for Defendant**

**T. NICOLAS, —Attorney for the same**

**JUDGMENT OF HIS HONOR E. PELLEREAU.**

Record No. 22,059.

26th October 1883.

In this matter the plaintiff prays the Court for a judgment condemning the Defendant to pay to him a sum of Rs. 1,165 as damages, for having illegally used and occupied certain premises since the 1st of January 1882, and to give and restore forthwith to the said Plaintiff the full possession and enjoyment "of the said store" with interest and all the costs of suit. Previous to that the Plaintiff applied for a judgment declaring that the

Defendant is indebted to the Plaintiff in the sum of Rs 1165, being the aggregated amount of: 10. eleven (11) months' rent of the store at Rs 55 a month, reckoning from the first of January 1882 up to 1st December in the same year, and 20. seven month's rent of the store at the rate of Rs 80 per month from the 1st of December 1882, up to the 1st of July 1883—and the Plaintiff further prays that the defendant "be condemned to quit, clear off and deliver up forthwith to Plaintiff the said store in good order and condition of repairs, with all costs of suit", and it is only subsequently in case the verbal lease entered into between the said Plaintiff as aforesaid concerning the said store be denied by the said Defendant, that Plaintiff makes the prayer I have mentioned first. It was argued by Hugues, on behalf of the Defendant that by virtue of article 6 of Ordinance 15 of 1881, the plaintiff could claim only one year's indemnity for use and occupation. The article on which he relied runs thus: "In any claim to rent or indemnity for the occupation of immoveable property, oral evidence shall when a lease is denied, and is not completely established by writing, be admissible to prove or disprove the occupation, and the amount or payment of the indemnity, and the party suing shall be entitled to such indemnity although it may result from the oral evidence given that the occupation existed under a lease. Provided that such claim of indemnity shall be barred by one year's prescription." It was contended by Hugues that the lease in the present case was a civil contract, that article 6 applied to any lease, when it was not fully established by writing, and in fact in this case, it was not at all established by writing; and that under the circumstances only an indemnity could be given and that the proviso limiting the claim to one year applied: It was argued by Galéa, on the other side, that this article applied only to cases in which oral testimony was not receivable at all to prove a lease, and that commercial leases—and he contended that the lease in this case was a commercial one—could be proved by oral testimony fully, and that therefore the article, either in its first paragraph, or in its second paragraph which contains the proviso, did not apply, and that he was entitled to prove by oral testimony the lease, and to claim more than one year's rent, that is the full number of months due.

On the point concerning article 6 I agree with the arguments of Galéa—what shows

That article 6 applies only to those cases in which a lease cannot be proved by oral testimony is the first phrase, in which the case contemplated is shewn to be that in which a lease is denied and is not completely established by writing. It is evident that what the Legislature meant, was not at all the case in which oral testimony was receivable to prove a lease; but a case which constantly arose at the time, in which a lease could not be proved by oral testimony, and in which it was not allowed even with the beginning of proof in writing, to adduce oral testimony at all—in which case the Legislature thought where a lease was not completely proved by writing there should be a certain remedy given, and the remedy was this action for indemnity, which is the subject of the article, and it is limited to one year. Therefore, if there are such things as commercial leases, and if commercial leases can be proved by oral testimony, they do not come at all within the provisions of this article; whilst I agree with Galéa that this article applies only to cases in which oral testimony is not receivable, I have on the other hand to enquire whether there is such a thing as a commercial lease, and whether the commercial lease, if any there be, can be proved by oral testimony. If it can be proved by oral testimony, and the article does not apply, then the prescription does not apply, and it is only by five years that the claim can be barred, the Plaintiff would be entitled to rent for the full number of months for which he makes a claim, it would be a claim of rent, and not merely a claim of indemnity, and in such case the plaintiff should succeed on his first prayer, and not merely upon the subsidiary prayer for indemnity.

Is there such a thing as a commercial lease, and is a commercial lease provable by oral testimony? In order to elucidate that point we must have recourse to certain articles of the Civil Code and of the Code of Commerce. It is laid down in article 1841 that the prohibition of oral testimony shall not apply to matters which are contemplated in the laws relative to trade. "Le tout sans préjudice de ce qui est prescrit dans les lois relatives au commerce." The old law from which this was borrowed expressed itself in a different manner. All the commentaries on the subject, and all the authorities hold that before the Commercial Jurisdiction, oral testimony is always admissible; they also hold in virtue of article 109 of the "Code de Commerce", that oral testimony may be adduced not merely for "achats et ventes", but for all trans-

actions of a commercial nature, or all transactions which are within the jurisdiction of the "Tribunal de Commerce," whether they be "achats et ventes" or otherwise, that the principle laid down in that article is a general principle, which has found its place here, because purchases and sales are the most numerous transactions in trade, in fact all the authorities agree that as to the matters within the jurisdiction of the "tribunal de commerce" oral evidence is admissible, unless this mode of proof be prohibited by some special commercial law.

It is therefore necessary to see what the jurisdiction of the "tribunal de commerce" is. This is laid down in article 630 and following of the Code de Commerce, not a new article 631 as modified by the french law 1856, but the old law which runs thus: "Les Tribunaux de Commerce connaîtront 1<sup>o</sup>. de toutes contestations relatives aux engagements et transactions entre négociants, marchands et banquiers; 2<sup>o</sup>. entre toutes personnes, des contestations relatives aux actes de commerce". Here are two principles very clearly laid down, matters which are commercial by their nature fall within the jurisdiction of the Tribunal de Commerce, whether the contestations relating to them concern traders or not. By the first paragraph all contestations relative to engagements and transactions between merchants, traders, and bankers, shall also be within that jurisdiction. It is not therefore necessary that an act should be placed amongst those which are defined as acts of commerce, in order to fall within the jurisdiction of the tribunal—it is sufficient that it should be a transaction or engagement occurring between merchants, bankers and traders. It has been ruled that it is not even necessary that both the parties should be traders or bankers or merchants, it is sufficient that one of the parties should be a trader; and as against the trader, any law suit concerning his engagements may be brought in the commercial jurisdiction, and the oral testimony which would be admissible between traders would be admissible as against a party who is a trader, although the other party may not be a trader, and although as against the other, the engagement being purely civil, oral testimony may not be admissible. I need not refer to the authorities on the point—those are principles which are not denied—and I simply mention them as they form a sort of preface to the arguments which I shall mention presently.

In article 631 there is a certain paragraph this : "toutes obligations &c." so that not only is the "Tribunal de Commerce" competent to decide on questions between traders, and against traders, but those transactions which have taken place on the part of a trader are reputed to be acts of trade. There are subsequent articles in that Code which limit this very general rule. If it be clear, for instance, that the operation done by a trader has been done for his personal purposes, and has no relation whatever to his trade, certainly it is not an act of trade ; but it is laid down that, that the general principle and presumption is, that whenever a transaction has taken place by a trader, it is presumed to be an act of his trade and concerning his trade, and it must be shewn in order to withdraw the particular case from the application of the rule, that it is not within the purposes of his trade.

Now is it necessary for the person who sues a trader to shew that the act is not civil ? He has the presumption on his side, it is for the other party, the trader, to shew that the act is civil. That may result from the very nature of the case itself, but can we say that a debt which is for the purposes of trade, although it may not actually be what the law calls an act of trade, is foreign to the trade of the parties or is civil ? In this particular instance, the case is that of a shop, which is rented by a certain man for the purpose of keeping his goods and retaining them, and inviting his customers to come and buy them there. If there is any thing which is necessary for a shop keeper's trade it is his shop—even the goods which he has to sell, although the buying and selling of them constitutes acts of trade, are not perhaps more useful to a shopkeeper's trade, than the shop in which they are exposed for sale. A trader does not require a shop, but a shopkeeper essentially requires a shop for the purpose of his trade. Taking the broad principle and the broad presumption, that every debt by a trader is an operation of trade, is there any thing in that law which says that what relates essentially to his trade, shall, because it may relate to an immoveable, not be an act of trade ? There is nothing of the kind that says so. "Toutes obligations entre négociants, marchands et banquiers."

We have no right, it seems to me, to make a distinction which is not in the law—and if a shopkeeper requires a shop for the purpose of selling his goods, it is simply the obligation of a trader. Where is the article of the law

which takes away from the operation of the general principle and presumption, the case of rent for property used, because that property is immoveable ? There are many authorities which say that the first paragraph of article 632 restricts the operations of trade to things moveable. "Tout achat de denrées et marchandises pour les revendre soit en nature, soit après les avoir travaillées et mises en œuvres, ou même pour en louer simplement l'usage." Therefore it has been argued, as defined by some authorities quoted, that the buying of an immoveable property could not be an act of trade. But this first paragraph is quite a part from the other paragraph—it is in a subsequent part independent of the first, that the law uses the words "toutes obligations" and the juxtaposition of the two articles, the former one applying to "denrées et marchandises" and the second one, only three lines after, not making any distinction, shews clearly that the Legislature wished to lay down in the latter a broad principle and presumption, without the distinction which exists in the first paragraph. Is there any exception to that ? None whatever ! One authority has been quoted which applies to the purchase of immoveables. It has been decided by the Court of Cassation in 1850, that immoveables could never form the subject of trade owing to their nature, that buying immoveables for the purpose of selling them, could not be considered as commercial. I quite understand that decision. The ownership of immoveable property is not necessary for the purposes of trade, but the use of immoveable property is sometimes necessary. It is not necessary that the trader should actually buy a house for the purpose of carrying on his trade, but it is necessary that he should have the use of a shop when he is a shopkeeper. There is therefore a distinction which can be made, and which has been made, between the ownership of a house bought, and the mere use of a shop for a certain amount of rent. I do not therefore consider the decision of the Court of Cassation as at all against the principle, that the use of a shop which is to be paid for, at a certain rate, cannot be the subject of a commercial debt. There is on the contrary a decision of the Court of appeal which is extremely important, and which applies to the case of a manufactory. The man who leases an immoveable for the purpose of carrying on the manufacture of goods, is there sued before the Court of Commerce, and it is stated in the decision, that the act is to be considered an act of trade. Why ? because the object was to carry on a manufactory—it contained the manufacturing

machinery and utensils, but it did not itself constitute the manufacture, just as in the case of a shopkeeper which we have now to decide upon. The shop is not itself the subject of trade, but it contains those articles which form the special object of trade, and I do not see therefore, why a distinction should be made between the case we have to decide, and that decision in which the Court proceeded upon a paragraph of Articles 632. That paragraph says: "toute entreprise de manufactures, de commission de transport par terre ou par eau." It does not mention operations of buying and selling, but we know that manufacturing constitutes an act of trade, and we see that any transaction between merchants, traders or bankers, constitutes an act of trade by a subsequent paragraph. Therefore if a house which is let for the purpose of a manufactory gives rise to a commercial debt, I do not see why a shop which is let for the purpose of keeping goods and carrying on trade should not also be considered an act of trade, in the face of the broad presumption and broad principle laid down, and in the absence of any exception to the contrary. There is another distinction to be made. The ownership of an immoveable property cannot form the subject of trade, but the debt which a shop-keeper owes for a lease is a sum for rent for the right of using the shop which he buys—Is that an immoveable right? There is nothing immoveable in it—Mr Hugues has argued that such a right was immoveable, but it is in fact moveable. If a shop-keeper hires a cart for the carrying of his goods to his customers, he thus makes a contract of hiring, that is moveable. Hiring the house is quite as much moveable. Besides, if we say it is necessary that the act should pertain to the trade of the party, what is the consequence that we are driven to? That there would be many acts which were necessary for a trader in order to go on with his trade and which do not form part of his actual trade, and which could not be proved by oral testimony, although they give rise to a debt. For instance, a shop-keeper has to buy goods and he borrows money to do so, the money is for the purpose of his business, he does not trade in money, he trades in goods, and yet it might be said in virtue of that principle, that that debt could not be proved by oral testimony. The debt might be for fitting up the shelves in the shop, or for the cases which the trader keeps to contain his goods, as all those do not actually form part of the buying for the purpose of selling, they are not commercial debts. I am at a loss to see the distinction between a debt for rent, which is a

moveable debt for a moveable right, and the other debts; and if we were to adopt such a distinction as that, objections to oral testimony would be taken that never ought to be taken, and which cannot be taken in the face of that paragraph of article 632 enacting that "toutes transactions entre négociants, marchands et banquiers, sont actes de commerce."

I therefore hold that that the debt for rent is a commercial debt, when the shopkeeper hires the shop to keep his goods in, and for the purpose of selling them.

The consequence is that the full number of months claimed by the plaintiff here should be paid to him, not merely up to the date of the demand, but also for the continuous months during which at various intervals he has made motions—Pending the case months have elapsed, and I am of opinion that he should have his judgment for the full number of months up to the end of this month. In my opinion the notice to quit ought to be validated, but of course it is probable that the defendant will not leave before the end of this month, and the plaintiff is therefore entitled to judgment for the whole amount that he claims up to the end of this month.

As to the amount to which he is entitled up to the 1st December 1882, there is no doubt whatever that Rs 55 a month are due. A notice was served on the defendant before that date in which he was ordered to quit on the 1st December, or else he would have to pay at the rate of Rs 80 a month. The defendant continued to keep the premises, and he says that he was allowed to remain after the 1st December 1882 at the rate of Rs 55, and there was a waiver of the notice. The plaintiff swears that there was no such waiver, but that what took place was this, he said:—"if you pay me the rent due up to the 1st of December 1882, I shall let you go on at the same rate as you are an old tenant. Between those two statements which are contradictory, I do not believe that of the defendant, and I believe that of the plaintiff to whom many months' rent are due, would go and tell his tenant to stay on, and withdraw the notice to quit, if he were not paid the sum that was due to him. The witness Nallatamby states that he was ordered to claim Rs 55, but in re-examination, he says he was never told that there was a waiver of the notice, and he does not state that he was told after the notice to quit had been given, that he was to claim Rs 55 for the month that elapsed after the



1st of December 1882—so that the evidence of Nallatamby is not against the plaintiff. Besides, there was the letter of the attorney in which he claims Rs. 55. It was an extrajudicial letter sent by the attorney. What is the value a letter of that kind? The attorney is privileged as an agent, but, like all agents, he must act by virtue of a certain power. The plaintiff says he did not instruct the attorney to claim only Rs 55, he said "claim Rs 55" up to the 1st December 1882, and afterwards "Rs 80"—the attorney stated in Court that he made a mistake, and the question is this, is an attorney who is an agent, entitled to bind his client, although he states himself he had mistaken his instructions? I believe that the evidence of the plaintiff, coupled with the declaration of the attorney, shew clearly that there was a mistake, and a mistake when proved to exist cannot be construed into a renunciation of a right or a waiver of a right. The plaintiff had given a notice to quit,—he was entitled to do so because he gave it a certain time previous to the date when the rent was to be increased. He was entitled to have Rs 80 a month from the 1st day of December 1882. If it be clear that a mistake was made by his agent, and it is clear to me, then the plaintiff cannot be said to have lost his right; and I am of opinion that Rs 55 a month should be the rent up to the 1st of December 1882, and Rs 80 a month should be the rent from that time up to the end of the present month. Therefore my judgment is for the plaintiff according to the first prayer of his declaration, the rent of Rs 80 a month to continue up to the end of the present month, from the 1st December 1882.

#### JUDGMENT OF HIS HONOR A. MURK

This is an action, in which the plaintiff claims the aggregate sum of Rs 1165 being 10. for eleven months' rent of a store in Queen street, Port Louis at the rate of Rs 55 per month from the 1st January to the 1st December 1882, and 20. seven months rent of the said store at the rate of Rs 80 per month from the 1st December 1882 to the 1st July 1883. and also prays that the defendant be condemned to quit the said store in good order, &c. Subsidiarily the plaintiff asks in case the verbal lease entered into by the parties be denied by the defendant, that an indemnity of the same amount as the rent for having illegally used and occupied the said store since the 1st January 1882, should be ordered to be paid to him. To this action

the defendant "inter alia" pleads that he is indebted to the plaintiff for only one year's use and occupation at the rate of Rs 55 per month, the remainder of the claim being barred by prescription which the defendant invokes, the defendant further tenders the sum of Rs 660, the amount of the aforesaid one year's use and occupation, and the defendant also pleads additionally that there was a waiver of notice to raise the rent (which notice is founded on by the plaintiff as giving right to the higher rental of Rs 80) by allowing him to remain in the store. Evidence has been laid in the case, from which it appears that the plaintiff bought the store in 1875, at which time he found the defendant was tenant of it, that the latter continued to be tenant at the rent of Rs 55 per month, until in the course of the year 1882, having received an offer of Rs 80 for the store, the plaintiff sent a notice to the defendant asking him to quit on the 1st December 1882, or otherwise to pay a higher rent of Rs 80. The defendant did not leave at the time mentioned, and is still in possession. The parties appeared to have had a conversation about the terms upon which the defendant should be allowed to remain, the plaintiff alleging that he consented to that, if arrears were paid up, and the defendant that the plaintiff having withdrawn the notice to quit he remained tenant at Rs 55 per month.

Both parties found upon the terms of the sixth article of the recent Ordinance No. 45 of 1882, under which oral evidence is made competent in a claim to rent for the illegal occupation of an immoveable property, when the lease is denied, in order to prove or disprove the occupation and the amount of the indemnity. The plaintiff found upon these provisions, as entitling him to lead oral evidence, whilst the defendant bases his case on the proviso, that such claim for indemnity shall be barred by one year's prescription. The declaration in the case was served on the 18th July 1883, so that the claim for indemnity prior to 18th July 1882 is pleaded to be barred by this enactment.

The plaintiff maintains further, that the clause in this Ordinance does not apply to any class of lease, in which the law at present excludes oral evidence. With this contention of the plaintiff, I cannot agree; the terms of the article are perfectly general and absolute in their character, and leave no doubt in my mind, that the intention of the legislation was, that it should apply to all

sases of every kind of subject, and whether the lease was civil or commercial in its character. The plaintiff further founds upon the provisions of the "Code de Commerce" as giving him an absolute right to lead proof in regard to the whole of his claim, and in this way an anterior question arises, before that of the law of prescription can be applied. The principal question in this case is, was the transaction an act of trade by which the defendant being found in possession of the subject at the time the plaintiff bought it, was allowed to remain there as tenant? This is a question which has exercised the minds of Jurists in France, chiefly in consequence of the fact that there are special tribunals in that country for the determination of commercial questions, it being important in many cases to fix the true Court in which legal proceedings may be taken. It is clear that in such a system of jurisprudence, an importance will be attached to questions of that nature, which they have not, when the law is administered in all its branches by our Supreme Court, the result being that in France distinctions have arisen, and have in some instances been sustained, which it is quite unnecessary in our system of law to regard as fixed and absolute rules of law. An instance of one of these cases to which I thus refer will be mentioned hereafter. We may certainly say this much, that the law of this Colony on such a point should be determined by first principles, and not by the expediency of one Court rather than another entertaining certain kinds of litigation.

Before leaving this part of the subject, it may further be observed, that this tendency of the Court in France, has been increased by the fact, that, in recent times, the buying and selling of real estate has become a business followed by certain persons as a speculation, and that in the frequency of such transactions a certain number of Bankruptcies has taken place, and the Courts there have become desirous of extending the Bankruptcy laws to such individuals. In doing so they have given a wider and more extensive meaning to the words "Commerce" and "marchandise". There is no necessity in Mauritius, which has the benefit of special bankruptcy laws, to be led by the same considerations into distinctions, the very existence of which in the jurisprudence of the Colony would prove a fertile source of further litigation.

It is in the first place to be noticed that the present question concerns the hiring of an immoveable subject, while it is the fact that

the general case immoveable subjects can alone form the subject of commerce properly so called. The idea of commerce involves in it the transference of goods from one place to another, and therefore cannot be applied to a subject which is incapable of being moved. Commerce brings to us the produce of lands both near at hand and at a distance, and there is a radical distinction between the trade in such articles, and the mere buying and selling or hiring of some immoveable subject; accordingly all the transactions mentioned in articles 631 and 632 of the "Code de Commerce" apply entirely and necessarily to moveables. The Code says that an act of Commerce is "Tout achat de denrées et marchandises pour les revendre" where the mention of "denrées" and "marchandises" undoubtedly points out the kind of articles which are to be the object of commercial decisions, and implies the exclusion of all subjects not of the same nature. If it had been meant to make the clause absolute and universal in its meaning, it would have been easy to have said "tout achat pour revendre" omitting the words which limit and point out the sphere of the Tribunals of Commerce, and these words being omitted, it might have been possible to hold that the buying and selling of immoveable subjects, or the hiring of them would be an act of trade; again the difference between the sale or the hiring of moveable and immoveable subjects is very great. The transactions in the one case are completed by a real delivery, and on the other by a symbolical delivery; in the one case, it is possible to move the subject from the place where it may have been sold, to the most distant part of the earth; and on the other the subject remains fixed in the spot where it originally was, incapable of being reduced into manual possession, and yet, at the same time capable of being hypothecated, of being burdened for years with a payment of the price, and of being resumed, if the price be not paid within a reasonable time. Each of the other illustrations given in the 632nd article refer to moveable subjects. The only case that needs special notice is the phrase "toute obligations entre négociants marchands et banquiers" from which it was argued that every transaction between people of these characters was an act of commerce, but it is clear that the phrase must be construed, "*secundum materiam subjectam*" and refers to obligations undertaken by merchants and bankers in these characters, and relatively to their respective trades, and not to every transaction whether civil or commercial which the merchant or banker may enter into.

Every commentator of authority lays it down that the object of the transaction, not the mere fact of the profession being that of a commercial man or banker, will determine its commercial character. These principles seems universally adopted by all writers of authority in France, and even authors who carry their views of Commercial Law further than others in this matter, lay down the same rule. I refer to Coujet and Merger who in their "Dictionnaire de Droit Commercial" say: (Art. 74) "Si en effet on prenait le mot marchandise dans son acception générale absolue, on serait forcé de décider que tout achat fait nonseulement pour revendre mais même pour louer l'usage de la chose achetée, serait acte de commerce, par conséquent que tout acquisition d'une maison pour la louer, ou d'un bien rural pour l'affermir, constituerait une opération commerciale, ce qui serait évidemment absurde".

As has been said, the object which the parties had in view is the chief characteristic which distinguishes a commercial from a civil transaction, it follows that every article bought with the purpose of creating a traffic, or of reselling with a profit, will constitute an act of trade; further, if the act be done in the habitual course of action which constitutes a trader, there is a presumption that it is an act of trade, while individuals who are not merchants or traders may do an act of trade, by buying something or other with the intention of subsequently reselling it with a profit. It is then solely the object which the party has in view, which gives to the transaction a civil or commercial characteristic. But the Courts of France have almost universally held that the buying and selling of real estates is purely a civil transaction, this is a constant and invariable doctrine of these Courts, and so far as I am aware there is no departure from that principle. A leading case is reported in Sirey 1850 Part I page 593, in which the rubric is thus put: "L'acquisition des biens fonds pour les revendre en détail, ne constitue pas un acte de commerce" and the Court of "Cassation" thus state their views on the question at issue: "Que si dans l'énumération des choses qui sont indiquées comme éléments constitutifs de l'acte de commerce les articles 632 & 633 Code de Commerce ne sont pas limitatifs il est manifeste, néanmoins, que les dispositions de ces articles ne peuvent être étendues, par analogie qu'à des choses de même nature que celles qui s'y trouvent énoncées, que le caractère essentiellement mobilier de ces

"choses exclut nécessairement de l'extension permise les biens fonds et les immeubles, que ces sortes de biens, en effet résistent par leur nature, aux conditions sur lesquelles une chose peut être réputée marchandise, qu'ils ne comportent ni dans leur transmission, ni dans leur évaluation, à un prix déterminé, ni dans leurs produits ou mode de jouissance et de consommation, la rapidité, la simplicité et les facilités que requiert le négoce et qui font qu'une chose passe sans entraves et presque sans formalités de main en main avec une valeur rigoureusement appréciable et un prix courant qui la suit toujours et la remplace au besoin."

The learned reporter to the Court in this case after stating strongly his view than to decide, in conformity with the argument of the appellant would carry the Court far further than it had ever gone, warns them that after having decided that the purchase of real estate to resell it, would constitute an act of commerce, they would be forced forthwith to decide, to preserve consistency in their decisions, that the hiring of an immoveable subject would equally constitute an act of commerce, he says: "si bien qu'on ne pourrait désormais acheter un immeuble pour l'affermir sans devenir commerçant."

This leads to the observation that almost every commentator on those articles of the French Code and every decision of the Supreme Courts of France invariably lay down that the contract of lease is essentially one of the Civil Code. Many judgments may be referred to, but it is sufficient to give the rubric of the case reported S. V. 1848 Part 2 page 247, of which the rubric is thus conceived: "Les contestations relatives à l'exécution des baux à loyer intervenus même entre commerçants sont de la compétence du tribunal civil, le bail à loyer étant essentiellement un contrat de droit civil." The case quoted by the plaintiff from S. V. 1852 Part I page 23, was the hiring of a carriage to convey merchandise from one place to another, and being thus concerned with a moveable subject is not in my opinion in point, the article in question of the "Code de Commerce" expressly recognizing that the hiring of moveable subjects is within the competence of commercial tribunals. The plaintiff quoted another decision from Sirey 1851, 2<sup>e</sup> part, in which the rubric is "Le bail d'une usine et de son mobilier industriel ne constitue pas un acte de commerce de la part de son propriétaire, au cas même où il est commerçant et bien que cet acte ait un caractère

commercial à l'égard du premier qui a loué l'usine pour l'exploiter". But this decision illustrates the danger which I pointed out at the beginning of this judgment, and cannot in my opinion be taken as a precedent for this case, inasmuch as one part of it is in favour of the plaintiff and the other of the defendant.

With the doctrine I have now stated, that the hiring of an immoveable subject is not an act of commerce, I entirely agree; applying the doctrine to the question in hand, the circumstances want all the characteristics of a commercial transaction, the plaintiff clearly bought the subject, not as a speculation to sell over again, but as a permanent investment of his money, on his entry he finds the defendant there as tenant, and he continues him in that capacity; this seems to be clearly a contract of civil right, and the parties though both were traders, had nothing to do in the relation of landlord and tenant, with their respective commercial pursuits.

It has been said that the Dictionary of Commercial Law by Coujet and Merger, has carried further than others the principle that speculation and trade may be involved in the purchase and resale of immoveable Estate, and they suggest that whenever it is certain that the contracting parties had the intention of making a traffic, and that the purpose of the whole transaction was speculative, it could not be pretended that they did not do an act of commerce. Even these authors however limit their doctrine in this way, that the intention to resell only makes the purchase a commercial matter, when the projected resale is the determining cause of the operation, and the speculation bears precisely on the profit to be derived from the resale; and they confine their theory, that real estate may form a commercial transaction, to the case when it forms part of what they called "un fonds de commerce" a stock in trade, it is in that event only, that the immoveable subject can be according to them subjected to the Commercial Tribunal.

- Holding therefore that the present question is not one falling under the "Code de Commerce" it seems impossible to form any other conclusion, but that the case must be brought entirely within the operation of the sixth article of Ordinance No. 15 of 1881, which I hold applies to all leases whether commercial or civil. Oral evidence is made competent to prove "any" claim to rent for the occupation of an immoveable property. The language is absolute and seems to me to

extend over the whole range of the contracts of lease and real estates, but then when the contract of lease is denied and is not established by writing, the oral evidence sets up the claim to the extent only of one year's indemnity, and I am of opinion that the plaintiff can only recover for the year preceeding the raising of the summons.

A subsidiary question was argued by the parties, notice to quit the subject at 1st December 1882 was given to the defendant by the plaintiff, with the alternative that if he chose to remain, the rent was to be raised to Rs 80 per month. The defendant did remain, and there can be no doubt that the presumption in the ordinary case should be, that the party who remains in the premises, from which he has been warned, has acquiesced in the payment of the higher rent claimed from him. This however is a mere presumption which can be taken off by proof that the landlord has withdrawn his notice, and allowed the tenant to remain at the original rent, or if as in the present case, the decision by the plaintiff's own delay has come to depend upon the section of the Ordinance, in which the law contained in the proviso comes into operation, all that the plaintiff seems entitled to is an indemnity for the use and occupation of the subject. The notice will be in force only if the plaintiff made his claim for rent in time. If by sleeping on his rights, he allows the prescription of the Ordinance to operate, he has only himself to blame; that the Court must proceed to consider the real sum to which he is entitled for the use and occupation of the subject. Here the accidental fact that the plaintiff had a friend who was willing to give a higher rent, does not show that the property had in reality increased in value.

I am therefore of opinion that the loss for which the plaintiff is entitled to be indemnified, will be properly gauged by allowing for one year, prior to the raising of the action, an aggregate sum equivalent to a monthly rent of Rs 55, and a further indemnity at the same rate from the day of the service of the summons to the date of the judgment.

#### JUDGMENT OF HIS HONOR J. ROUILLARD

The plaintiff in this case claims from the defendant eleven months rent of a shop in Port Louis, in which the defendant carries on his trade, from 1st January 1882 to 1st

December 1882, at the rate of Rs 55 a month, and seven month's rent of the same shop viz. from 1st December 1882 to the 1st of July 1883, at the rate of Rs 80 per month.

Amongst other grounds of defence, a plea of prescription was raised under article 6 of Ordinance 15 of 1881, which enacts that :

"In any claim to rent or indemnity for the occupation of immoveable property, oral evidence shall, when a lease is denied and is not completely established by writing, be admissible to prove or disprove the occupation and the amount for payment of indemnity, and the party suing shall be entitled to such indemnity although it may result from the oral evidence given, that the occupation existed under a lease. Provided that such claim for indemnity shall be barred by one year's prescription."

It was in other words contended by the defendant, that inasmuch as the plaintiff could not produce any written lease of the shop as required by article 1715 of the Civil Code, the only proof allowed to him by the above ordinance was that of the use and occupation by the defendant of the premises, and that plaintiff's claim ought to be limited to use and occupation during the year preceding the date of entering the action.

The plaintiff contended, on the other hand, that as the shop, the rent of which was claimed from the defendant, had been leased and occupied by him for the purposes of his trade, oral evidence of the lease, in the same way as evidence of all things relating to commerce, (when there is no special prohibition enacted by law) was receivable in Court.

The point was fully argued before us, and numerous authorities cited on both sides.

It seems to me after careful consideration, that the proper solution of the question at issue between the parties, is to be found in the very text of article 632 of the Code of Commerce, which gives a definition of what may be considered as "actes de commerce" so as to bring them within the jurisdiction of the Tribunals of Commerce.

The first paragraph of article 632 ranks amongst "actes de commerce."

"10. Tout achat de denrées et marchandises pour les vendre... ou même pour en louer simplement l'usage."

If we next proceed to examine the cases enumerated in the remaining part of article 632 and in article 633, as being "actes de commerce" we find that they likewise contemplate trading in moveable property.

In conformity with the principles laid down in the two articles abovementioned, both the French Courts and the French commentators hold that immoveable property cannot be considered as "marchandise", and that generally speaking it cannot be the object of trading. See "Pardessus No. 8."

It has been ruled by the Court of Cassation (Sirey Villeneuve, 50. 1. 593) that the purchase of immoveable property, even with the intention of selling it again, does not amount to an "acte de commerce."

It has been also decided by the imperial Court of Paris (Sirey Villeneuve 1861 2. 567) that the lease of an immoveable property for the purpose and with the intention of subletting it, does not constitute an "acte de commerce" (See on the same subject Sirey Villeneuve 1850. 2577 and 581) and S. V. 1858. 2. 414. and S. V. 1868. 2. 25) on the points settled by the above decisions, no contrary decision can be found.

It seems difficult then to understand how, when a purchase (or lease) of an immoveable property, with the intention of selling (or subletting) it is not considered by the law to be an "acte de commerce", the lease of certain premises, with a view to using them as a shop, can be an "acte de commerce," so as to allow the party to introduce oral evidence to prove the lease, contrary to the provisions of article 1715 of the Civil Code.

On the special point submitted to our consideration, only one decision of a french Court of appeal has been found, which ruled that oral evidence was not admissible, S: V. 8. 2. 237, but the terms of the judgment are very strong, the Court indeed seems to consider that the point was beyond dispute, it is singular that not a single decision of the french Courts should have been found hereafter on the point whether in such cases the Court might allow oral evidence, it seems as if the question were considered as settled definitively.

The Second Counsel for the plaintiff cited several decisions, S. V. 1852. 1. 23. S. V. 1854. 1. 299, but in all the cases referred to, the things were moveable property which clearly

some under the heading of "denrées" or "marchandises." In another case S.V. 1851 2. 331, which the defendant seemed to consider a strong authority in his favour, it was held by the Court of appeal of "Colmar" that a manufacturer who had taken on lease an immoveable property and its accessories, (son mobilier industriel) in order to enlarge his own manufactory had made an "acte de commerce", but the transaction in that case was not viewed by the Court in the light of a lease of immoveable property, but as an "entreprise de manufacture", which article 632 of the Code de Commerce includes in express terms amongst "actes de commerce."

Two decisions of the Supreme Court were cited. In one of them, Chauvet vs. Robert, Piston's report 1864 p. 89, the defendant does not appear from the report, to have been represented by Counsel, and there is every probability that the case was not fully argued before the Judges. In the other Fitzpatrick vs. Besonguer which is not reported, imprisonment was decreed against the defendant, a trader, who had taken on lease one of the hotels in this town, and this may imply that the Court held that the lease of an immoveable property taken by a trader for the purposes of his trade, constituted an act of commerce, but, as the defendant was also an alien, it is also possible that the judgment of the Court decreeing imprisonment was founded on this latter circumstance, the Record is silent as to the ground on which caption of the body was decreed.

I am of opinion that the lease of the shop to the defendant, even if it were taken by him for the purposes of his trade, does not constitute an "acte de commerce" and cannot be proved by witnesses, and that the plaintiff, in the absence of a written lease, can only recover for use and occupation of the premises for one year preceding the 18th July last and also for use and occupation from the 18th July last, date at which the action is entered, to the present date.—One last question remains to be solved, namely, the amount of the monthly sum payable in lieu of rent. The defendant is ready to suffer judgment at the rate of Rs 55 per month, which he had hitherto paid to the plaintiff. But the plaintiff claims Rs 80 from 1st December 1882, on the strength of a notice, which was served on the defendant at the end of last year, warning the defendant, that if he did not leave the premises on the 1st December 1882 the rent would be increased to Rs 80.

In presence of the fact that subsequently to the notice, rent at the rate of Rs 55 a month

was claimed from the defendant both by plaintiff's attorney and by the plaintiff's agent Nalletamby, I am inclined to think that the notice was waived by the plaintiff, as sworn to by the defendant; but the question seems immaterial, inasmuch as what the Court has to assess under Ordinance 15 of 1881, is a fair indemnity for the use and occupation of the premises, independently of any convention between parties, which in matters of leases, cannot be proved by witnesses. If the plaintiff attempted to raise the rent of the shop, it was not as he admits himself, because his property had become more valuable, but because he wanted to get rid of Defendant as tenant, the sum of Rs 55 a month is therefore a reasonable indemnity for the use and occupation of the premises by the defendant, and I shall allow to the plaintiff an indemnity at the rate of Rs 55, a month for one year from the 18th July 1882 to the 18th July 1883; at which date the declaration was entered, viz: the sum of Rs 660, and also an indemnity at the same rate from the 18th July 1883 to the date of the present judgment, say, a lump sum of Rs 180.

The notice to quit is further validated.

### Supreme Court

**ACTION FOR RECOVERY OF MONEY DUE FOR GOODS SOLD AND DELIVERED.—PAYMENT BY BANKRUPT ON ACCOUNT OF THE DEBTS OF HIS BANKRUPTCY, AFTER ISSUE OF HIS CERTIFICATE OF BANKRUPTCY.**

*This is an action for recovery of the sum of Rs. 1,101.50 for goods sold and delivered. The defendant acknowledged to have purchased the goods, but alleged that he is only indebted in the sum of Rs. 958, as he had paid the remainder and produced receipts.*

*The plaintiffs admitted that the payment mentioned by defendant had been made, but explained that it did not apply to the debt.*

*The plaintiffs stated that the Defendant had been formerly a customer of their Firm, and that he had become insolvent, and had only paid 20 o/o of his debts; that when he again applied to become a customer of the Firm, they had agreed again to deal with him, provided he paid a further sum of 80 o/o on what he owed them, so that their total loss would only amount to 50 o/o of their claim.*

*To this, the defendant assented and the sum alleged by him to have been paid on account of the debt now claimed from him, was in fact paid in accordance with this arrangement.*

*The Court upon the facts decided in favor of the plaintiffs.*

*In the second place the Defendant pleaded that under Article 150 of the Bankruptcy Ordinance (Ord. 83 of 1853), any arrangement made by a Bankrupt to favor one creditor to a greater extent than the other is declared to be null and void; and by Article 152, no debtor after his certificate, shall be liable to pay any debt for which he shall be discharged.*

*The Court held that these sections did not apply to the payment made by the Defendant under the arrangement related by the Plaintiffs.*

*Judgment in favor of Plaintiff for Rs. 1,101.50 with interest and costs.*

—  
Before

His Honor A. MURR—Second Puisne Judge

and

His Honor JOHN ROUILLARD—Acting Puisne Judge

—  
DUFF & Co.—Plaintiffs

versus

MEERZA CHUTTOO—Defendant

—  
H. GALÉA, Counsel for Plaintiff,  
A. ROLANDO, Attorney for the same.

T. L. JENKINS, Counsel for Defendant,  
A. ROHAN,—Attorney for the same

—  
Record No. 21948.

31st October 1883.

MR JUSTICE MURR :—In this case there is a question of fact and a question of law to be determined by the Court, the question of fact will appear when I state the nature of the case. This is an action for the payment of a claim of Rs 1,101.50, plus a sum of Rs 110,

which is stated to be a discount of 10 per cent, and which it is alleged the defendant has forfeited in consequence of not having paid the principal sum at the time of the raising of the action. The plaintiffs depart from the latter claim, so that the claim is reduced to the exact sum of Rs 1,101.50, for goods sold and delivered to the defendant.

These goods were sold and delivered on the 17th and 22nd of June and the 13th of July 1882. There were other goods delivered to the defendant in the preceding month of May, and subsequently in the month of December, and January and February, but those goods, both those which precede and those which follow the three days I have mentioned, are not part of the claim in the present action, and have not to be determined by the Court.

The defendant admits the delivery of the goods—he admits that he ordered them and that they were delivered to him, and he admits the prices in the account between the parties; and his defence is that he is not indebted in the sum of Rs 1101.50, but in the sum of Rs 958 only. He tenders documents proving payment of Rs 485.66, and he argues that on the 25th of November he paid by cheque a sum of Rs 485.66 and a sum of Rs 200 in money, and that the said sum was in payment of his indebtedness toward the plaintiffs. This state of facts is denied by the plaintiffs who say that there was only one payment made on that occasion, Rs 485.66, and that that sum consisted of two sums, one on account of goods of the value of Rs 285.66 sold and delivered in the preceding month of May, and the other of a sum of Rs 200 which was paid on a special account. That brings me to remark that the defendant here had been insolvent some time previous to the date of these transactions, during the year 1881. He had been previously absent in India, and his affairs had been managed by his brother, and on his return to this Colony he found himself insolvent, and obliged to make an arrangement with his creditors. An arrangement was made under the control of the Court, by which he paid 20 per cent to his creditors, and that arrangement was completed in August 1881.

The plaintiffs were creditors for the sum of Rs 15,789 and they, along with the other creditors, accepted the composition arrangement of 20 per cent, which the defendant engaged to pay to all his creditors. They accordingly received payment of one fifth of their claim, and then that matter had its end. The defendant has been for many years a



customer of the plaintiffs; about a year after the arrangement he went to the plaintiff's premises, and told them that he wished again to become their customer and buy goods from them. The reply of the selling clerk a Mr. Laroque was, that they had lost a good deal of money by him formerly, and that he must consult the leading partner in the firm, Mr. Walter Rogers, as to what could be done. There was then some negotiation between the parties and the defendant was told, and it is sworn to both by Mr. Walter Rogers and Mr. Laroque—that unless he could reduce to a certain extent the great loss they had sustained by him on a former occasion, further business was impossible. They then proposed to him—and they swear that he assented to it—that he should pay to them in addition to the 20 per cent of their old debt, 30 per cent, so that their loss would be just one half of the sum he owed them, and he would pay them 50 per cent. They swear that he agreed to do this, and to make payments of the sum of 30 per cent by instalments of Rs 100 per month, and the question arises as to whether that was or was not the case. The defendant denies these facts. He says that nothing of the kind was mentioned to him, that when he asked for a renewal of the business between himself and the plaintiffs, they said “we cannot do this for you unless you pay in advance.” The proposal was that he should pay certain sums in advance for goods to be afterwards ordered, and he says it is in that way that he paid the sum of Rs 100 on the 15th of May, that was at a time when he had given no order for goods. The first order for goods was given on the 25th of May some days afterwards; and goods were subsequently ordered, while he continued to make these payments of Rs 100 per month. He made in all three payments of Rs 100, and one, they say, of Rs 200. He affirms he made this payment of Rs 500 in prepayment of the plaintiff's claim.

On this question of fact, the Court is clearly of opinion the plaintiffs have made out their case. It is in the first place an incredible supposition, that a firm of merchants should make an arrangement with a customer to pay in advance before any order was given. I can conceive that they might make a bargain with him, that he should pay in cash upon delivery, of a partial sum at delivery, and the rest payable at the usual credit; but that there should be an arrangement between the parties that prior to any order being given, there should be a deposit in advance, seems to be an incredible fact, and one which goes against the defendant very seriously. There is another

fact which seems to disprove this assertion, and that is the terms of a receipt which still exist. That receipt very clearly sets forth that the sum given was a sum paid upon the old accounts between the parties.

This receipt still exists, and undoubtedly its terms strongly confirm the case of the plaintiffs. There are three receipts which the defendant has mislaid or suppressed, or which, at any rate, we have not here, and one of those is that which represents the sum paid on the 15th of May—the plaintiffs say that at that time they did not put in the words “sur ses anciens comptes” because he had ordered no goods,—that subsequently when he had ordered goods as it was possible he might say the payments were on account of the goods he had ordered, they inserted the words “sur ses anciens comptes.” That was accordingly done, and I have no doubt that the proof of these facts is complete, independently entirely of the parole testimony, we have this documentary evidence, which supplies complete proof of the disputed facts, and therefore the case of the plaintiff is the true one. If we had to consider the matter upon the testimony of the parties, we have three witnesses, Mr. Walter Rogers, M. Laroque his selling clerk, and Mr. Martin his Collecting clerk, who all testify to the same facts and who contradict the defendant. There is therefore, no doubt in the mind of the Court, that upon the facts of the case the matter has to be determined in favor of the plaintiff.

There is another question of fact on which the parties are at variance, and that is as to the sum of Rs 200, which was paid upon the 25th of November. As to that sum the defendant maintains that Mr. Martin came to him in the forenoon, and got a cheque from him for Rs 435.65, on account of what he owed the firm—that in the afternoon Mr. Martin again came to him and represented that he had expected to receive something more from him, and thereupon, the defendant says, he paid Rs 200 in ready money which he had on the premises. The plaintiffs on the other hand, maintain that this is an untrue account, that the Rs 200 was paid, as the receipt which is produced states, on account of the 30 per cent on the old debt of 1881, which he had agreed to pay by monthly instalments, that he had been two months in arrear then, and he consented to pay that sum, and they shew very clearly and distinctly by the accounts they have produced, that there was an account for goods which was then due, which amounted to Rs 284.87, and that that is the exact



sum, together with a quarter per cent upon the account, which is made up of these two sums. In addition to this strong fact we have the oath of Mr. Martin, who positively swears that he did not receive two different sums that day from the defendant, but a cheque for the whole sum and that he had nothing to do with him on that day except what he stated. The Court is unhesitatingly of opinion that the circumstances of the case confirm the statement of Mr. Martin in this matter, and the Court is bound to hold that there were not two payments made by the defendant on that day, but only one sum of Rs 485.66 and that of that sum, Rs 200 was a payment on the "anciens comptes." The question of fact is thus decided in favor of the plaintiffs.

We have now to consider a very important question of law which the defendant raises in this matter, and one which is founded upon a section of the old Bankruptcy ordinance which is in force in this Colony. It is perfectly plain that one of the great principles that lie at the foundation of all Bankruptcy laws in every country is and must be this, that upon the failure of a debtor to pay his creditors in full, the inadequate fund ceases to be his property, and becomes the common property of the creditors. It seems to follow as a consequence from this, that there shall be a fair and just distribution between the creditors of the bankrupt's estate of the whole common fund—and that there shall not be a preference given to one creditor over another. In different bankruptcy systems, various regulations have been made to endeavour to carry out this principle, among others, in certain circumstances, in the bankruptcy ordinance which was recently in force in this Colony, treble the amount of the sum is to be paid as a penalty, and there are two sections near each other which also tend in the same direction. By the 150th section it is said:

"Any contract or security made or given by any bankrupt or other person unto or in trust for any creditor for securing the payment of any money due by such bankrupt at his bankruptcy as a consideration or with intent to persuade such creditor to forbear opposing or to consent to the allowance of the bankrupt's certificate or to forbear to petition for the recall of the same shall be void, and the money is not to be recoverable, and the party sued on such contract or security may plead the general issue.

That is one of the regulations.

It is a legal contract to prevent a ban-

krupcy proceeding freely, and to prevent the certificate being freely confirmed, when it comes to be granted and during the existence of the bankruptcy. But the clause on which the defendant founded his objection is the 152nd which is in these terms.

"No bankrupt after his certificate shall have been allowed, shall be liable to pay or satisfy any debt claim or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt claim or demand upon any contract promise or agreement made after the issuing of the fiat or filing of the petition for adjudication in bankruptcy, and if any bankrupt be sued upon any such contract he may plead the general issue, and give this ordinance and the special matter in evidence."

This clause evidently contemplates more than one special circumstance, in the first place, if the matter shall arise after the certificate shall have been allowed, in the second place the bankrupt is not to be liable to pay any debt upon any contract promise or agreement made after the issuing of the fiat or filing of the petition for adjudication in bankruptcy, so that the ordinance seems to contemplate some arrangement made during the existence of the bankruptcy, and to be fulfilled after the certificate has been allowed. What the statute further says is that no bankrupt shall be liable to pay or satisfy any debt upon any contract, promise, or agreement, made after the issuing of the fiat, and it is very clear here that if there had been an agreement between the plaintiff and the defendant, under which he had made a promise to them to pay this 30 per cent after the certificate had been allowed, and that had been done during the existence of the bankruptcy, this section of the Ordinance would have directly applied. But I fail to see that it applies to the circumstances of the present case, the defendant could not have been sued on any such promise in any Court of law; what the defendant did was this: he went to the plaintiff a year after the arrangement was completed, and asked for renewal of credit. The plaintiffs said "we cannot renew credit to you, we have made a great loss by you and you must make our loss less," that is to say, you must give us a greater profit on the goods we now sell than we otherwise would have had. It might be argued that such a promise was against the bankruptcy statute if such a promise was asked to be enforced by the Court, but here what have we got? There was a natural obligation undoubtedly, and but for the

statute it would have been due. We have this debt still existing, but for the procedure of the statute, and we have the parties coming together and the defendant apparently with willingness, consenting to pay certain sums. The sums have been actually paid, with the view, as we have held as matter of fact—“en règle sur ses anciens comptes”, and it seems to us to be out of question that the defendant should now be entitled to say that having appropriated these sums for a special purpose, and the matter being entirely past and gone, you had money of mine in your hands, and you are bound to apply that to the payment of my debt—for that is his argument. But the Court holds that that is a matter upon a different transaction entirely, and that it is a matter which does not arise under the statute.

That being my opinion, and also I believe the opinion of my learned brother, it remains merely to state that we find the defendant liable to the claim of Rs 1101.50 with interest at 12 per cent, it being a Commercial debt, and costs.

### SUPREME COURT.

**WRIT OF INJUNCTION.—FELLING OF TIMBER UNDER A LEASE.—SALE OF WOOD TO THIRD PARTIES, NOT BOUND BY WRIT.**

*Defendant was the lessee of a portion of land on the sea coast of Flacq, belonging to Government, partially planted with filao, and a portion of which he was entitled to cut year by year.*

*The plaintiff alleged that Bax had contravened the lease, and was felling trees that he was not entitled to cut, and applied for a writ of injunction which was granted.*

*It appears that the Defendant, Bax, had sold a portion of the wood to Messrs. Pilot and Bigaignon, the intervening parties, this wood was lying on the land leased, but it could not be removed in consequence of the writ abovementioned.*

*The Court held that there was nothing to shew that the trees felled, and sold to Messrs. Pilot and Bigaignon, were not part of the trees Bax was entitled to cut down—that moreover the intervening parties had*

*purchased in good faith, there was nothing to lead them to suppose that the right to sell, conferred upon Bax by his lease, had been withdrawn.*

*Ruled that the writ of injunction quoad the trees cut by Messrs. Pilot and Bigaignon, be dissolved.*

THE COLONIAL SECRETARY—Plaintiff.

versus

BAX—Defendant

PILOT and BIGAIGNON—Intervening parties.

Before

His Honor E. PELLEREAU,—Acting Chief Judge

His Honor A. MURE,—Second Puisne Judge  
and

His Honor J. ROUILLARD—Acting Puisne Judge

The Substitute Procureur and Advocate General,—Counsel for plaintiff  
J. GUIBERT,—Attorney for the same

W. NEWTON,—Of Counsel for Defendant  
H. BERTIN,—Attorney for the same

V. DELAFAYE,—Counsel for Intervening parties.

E. SAUZIER,—Attorney for the same.

Record No. 21,175

31st October 1883.

*Mr Justice PellerEAU:—In this matter the Colonial Secretary has obtained a writ of injunction in terms which are fully set out in*

the writ itself, and which practically effect Messrs Pilot and Bigaignon. The writ was obtained upon an affidavit sworn by Brousse and Faduilhe, in which it was stated that "in breach of the terms and conditions of the lease which is evidenced by an instrument drawn up by Mr Notary Vincent Geffroy dated the 27th May 1868, trees have been cut down in the four rows of filaos mentioned in article 4 of the lease, and up to the present time the trees of the said four rows, which have either been cut down or otherwise injured, have not been replaced agreeably to the said article 4 of the said lease. That in breach of the obligation imposed by and under article 5 of the said lease all the unplanted parts of the land leased have not up to the present time been planted. That in breach of article 7 of the lease the present holder of the lease Mr Lucien Bax is actually cutting down a great many trees being on the land leased, altho' before the end of June of the present year, the trees previously cut down had not been fully replaced agreeably to the lease".—

It will be noticed that up to the time when the writ of injunction was applied for, Bax was allowed to remain in possession of "pas géométriques" in right of the lease. Under one of the conditions of the lease, if any breach of the lease is committed, or if certain acts are done, upon a mere application for possession and upon an affidavit, the lessor can re-enter and take possession of the land leased—but three conditions are requisite to allow this to take place: there must be first, one of the breaches mentioned in the lease, second the application for the writ of possession, and third, the affidavit; up to the time when the writ of injunction is applied for, Bax is allowed to remain in possession of the land, and he is allowed to hold himself out to all the world as being the tenant, having a legal right to the land by virtue of his lease. Whatever may be said against Bax may not always be said against third parties, who seeing Bax in possession of the land, may act as if he were entitled to that possession for certain purposes. Pilot and Bigaignon have produced an affidavit in which they refer to the lease, and therefore they may be held to have a knowledge of the lease, and they may be considered to be bound by the conditions of the lease; but there was nothing in the lease to shew to Pilot and Bigaignon that there had been a breach of the conditions of the lease, and the fact that the Government allowed Bax to remain in possession, and that Bax was to all appearances a tenant under that existing lease,

was a fact which, up to the moment when the lease was attacked, enabled and induced third parties to consider him as having rights under the lease, and by virtue of the conditions in it. Therefore Pilot and Bigaignon may be considered as having rightly taken Bax to have the power under the lease, of selling the "filaos" which did not form part of the four rows of the "filaos" planted, and they had not to ascertain whether he had fulfilled years ago all the conditions of the lease; and when they saw that Bax was allowed to remain in possession, it was not for them to go and ascertain whether all the land had been planted. It would be going really too far to suppose that before a man can safely buy the vegetables of a tenant's garden, being the fruits of the soil, when the landlord allows the tenant to remain in possession, he must enquire whether there has been a breach of the lease or not; it is for the landlord who suffers to enter an action, and had the action been entered in this case, then of course the Government might have said, the right of Bax could no more be exercised—but so long as he was allowed to remain in possession of that lease intact, Bax must be taken as between him and the third parties to have had the right of selling under the lease, and the third parties especially must be considered as entirely protected, when they give their money for that which under the lease Bax may be considered as having had the right to sell. Breaches of the contract they were not aware of, and cannot be bound by, since the Government itself has not taken action in order to signify to the tenant or to the world whether any breach had been committed.

The question which remains, is whether timber which has been cut by Pilot and Bigaignon, was timber which Bax was not entitled to cut under the lease. There is nothing whatever in the affidavits of Government to shew that the "filaos" which have been cut, and are now lying on the ground, are part of the four rows of filaos which existed originally, or of those which may have been planted to replace them—there is nothing to shew that that timber is beyond a sixth part of the filaos which Bax was entitled to cut, and therefore Pilot and Bigaignon may very well say. "We have looked at the lease which you have never attacked, we have seen that a right existed to sell so much of the filaos, we have sworn an affidavit that Lucien Bax has the right to dispose under the lease from the Government of the trees cut. Government has not at all shown by any affidavit or evidence, that the timber there cut exceeded the

sixth part which by virtue of the lease Bax had a right to cut, and therefore the Government is not entitled to say that as regards us, Pilot and Bigaignon, Bax has not the right to sell."

Pilot and Bigaignon have dealt legally with a party, who as to them had the right of disposing of the "silaos" trees,—it is here the property of a person who has the right to dispose of it, which they have purchased, and under the circumstances they seem to us entitled to obtain the removal of the writ of injunction, unless there be something in the case which is pending between Bax and the Government which may affect their rights. What is the action pending between Bax and the Government? The Government contends that Bax has committed certain infractions of the lease, that he having broken certain of its conditions, it is entitled to have that lease cancelled. But supposing the Government obtains judgment in its favor, will that judgment in any manner affect the right of disposal of the timber, which Bax possesses as towards third parties, or affect the subject which Pilot and Bigaignon under the law have had by buying moveables from the possessor of those moveables? Suppose the trees cut had not been replanted, of course the lease would have been cancelled as against Bax.—Bax was the tenant up to the moment when the application for the cancellation is made.

It is said in the deed of lease that "ipso facto" by the breach being committed there will be a cancellation, but nevertheless that cancellation must be applied for; and if the Government allows the tenant to remain in possession, there are certain rights which as we have shown accrue to third parties from the fact of that possession; and can the cancellation which takes place afterwards, act retroactively so as to destroy the rights of those third parties? Suppose for instance, that a tenant has not paid his rent but has gone cultivating and has sold the produce of his land, and obtained money for that produce, will it be said that because the landlord has not been paid and he can obtain a cancellation, that those moveables will cease to be the property of the third party? I believe there that article 2279 will apply, and protect the third party.

We say nothing as regards the timber which is still standing, the growing trees, because the question will arise whether they can be considered as moveables—but with regard to the trees felled, they are undoubtedly moveables. As a fact they have been cut, they are

in the possession of the third party, who has paid for them, there was a tenant in possession who had a right to sell one sixth, and it is not shewn that the trees cut exceed the sixth,—by reading the lease the third party could not have thought that Bax had not executed the conditions of the lease, and he is therefore a *bona fide* purchaser coming under article 2279. It has been argued that Bax could not dispose of his trees,—that may be true as far as the growing trees are concerned, but with regard to the trees felled, and which must be looked at as moveables, Bax had the right to dispose of them up to the one sixth. It is sworn to by Pilot and Bigaignon that he has the right to dispose of these trees under the lease from the Government, implying of course that they are within the sixth. This is met by no allegation whatever upon oath that the trees cut down exceed that sixth, or are part of the four rows of trees.

We are therefore of opinion, that the case which will be decided between Bax and the Government, will not at all affect the rights of Pilot and Bigaignon, as to those trees which have been cut, and are now lying on the ground; and we rule, that the writ of injunction be dissolved *quoad* the trees cut by Pilot and Bigaignon, and lying on the ground before the service of the writ of injunction on Bax. Costs of this application against the Government.

## SUPREME COURT

APPEAL FROM DECISION OF STIPENDIARY MAGISTRATE. —SALARY DUE TO MANAGER OF "HEMP COMPANY". — POWERS OF BOARD TO REDUCE SALARY OF MANAGER.

*This is an appeal from a decision of the Stipendiary Magistrate of Pamplemousses on a question of salary.*

*According to the bye-laws of the "Rouge Terre Hemp Company Limited", the Respondent was appointed Manager of the Company during the whole period of the Company's existence, which was fixed at ten years. The Bye-Laws further provide that the Board of Directors shall have the power to "fix" (fixe) the salary and duties of its employees—of whom the Manager is one.*

*The Board considered it absolutely necessary to reduce the salary of the Manager from 400 Rupees to Rs 150, and accordingly in*

*March 1883 he was warned that it would be reduced to Rs 150 per month.*

*In the Stipendiary Court, the Respondent claimed salary at the rate of Rs 400 for the months he had been employed, and had not been paid, the Magistrate gave judgment in his favor; against this judgment the Company appeals.*

*The Court held that the Board had the power to modify the salaries of the employés of the Company as well as their duties.*

*Judgment of the Magistrate reversed. The Court decides that the Respondent is only entitled to Rs 150 per mensem, except for the month of March, which had been begun when notice of reduction of salary was given to Respondent.*

*Respondent to bear costs of appeal—no costs in Court below.*

**The "ROUGE TERRE" MAURITIUS  
HEMP ESTATES COMPANY  
LIMITED in liquidation,—Appellant**

*versus*

**ANDRÉ LAGREULA,—Respondent**

*Before*

**His Honor ETE. PELLEREAU,—Acting Chief  
Judge**

**His Honor A. MURE,—Second Puisne Judge.  
and**

**His Honor J. ROUILLARD,—Acting Puisne  
Judge.**

**V. DELAFAYE,—Counsel for appellants  
E. SAUZIER,—Attorney for the same.**

**E. GALLET,—Counsel for respondent  
E. GANACHAUD,—Attorney for the same**

**Record No. 98.**

**31st October 1883.**

**The acting Chief Judge :**

In this case the plaintiff now respondent, claims a certain sum of Rs 400 as his monthly salary for six months. The real contention between the parties is whether he is entitled to that sum of Rs. 400 or whether he is entitled to salary at the rate of Rs 150 a month,

to which he was reduced in March 1883. There can be no contention that with regard to the month of March 1883 the full amount of this salary was due as the month had begun, the contention relates to the six months which follow the 1st of April 1883.

It appears that Lagreula was by the by-laws of the "Rouge Terre Hemp Estates Company Limited", appointed manager "de "Rouge Terre" pendant toute la durée de la "société fixée à dix années comme il est dit "ci-dessus". It was argued that in virtue of this he could not be turned out, unless there was some just and reasonable cause for doing so, and such cause is not shown to exist. The same article (19) which mentions the appointment of Mr. Lagreula says that the Board has the power to appoint a secretary and a manager "pour la direction et l'exploitation "de "Rouge Terre qui peuvent être choisis "en dehors des actionnaires. Il fixe leurs "attributions et leurs retributions ainsi que "celles de tous les employés de la société." It seems clear to this Court that the Board received there the power of modifying the salaries as well as the attributions of the "employés" the word "fixe" does not imply permanency as argued for respondent. Supposing a modification is made in the salary, a new decision which lays another sum down on the paper for the salary, would be a decision which fixes it again; it is a change, but that change at the same time fixes a sum. The Board reduces its Manager's salary from Rs. 400 to Rs. 150 and we cannot understand the word "fixée" as being something permanent for ten years, or else there would be this consequence that the attributions could not be changed. Could it be said that when the secretary and Manager are appointed, and the limits of their attributions, or work, are fixed, the Company will never be able to extend or change them during the ten years, and that the whole must remain permanently fixed in complete stationariness? That cannot be held for a moment, and yet the word, "fixe" applies to work (attributions) as well as to pay (retributions). The manager would come forward and say his work has been fixed within certain limits and no more work is to be given to him,—nay more, as the words are irrespective of any special manager, successive managers might come forward and say that the work has been fixed for the first manager within such and such limits, and it cannot be altered. But in connection with this point I must say that there is an argument on which the Judges do not agree, although they arrive at the same conclusion.

hold that the right of fixing the pay and distribution, changing them and modifying them, is according to this bye-law fully vested in the Board, without any limit whatever. My brother Judges hold, on the contrary, that the power of changing must be exercised within certain reasonable limits, but they hold also that in this particular instance, owing to the bad state of affairs of the Company, which led in fact to a failure, it was quite reasonable under the circumstances to exercise the power, and to reduce the salary to Rs 150. I think that the power is as broad as possible. The Board here receives a certain power, which is a control in fact over the manager. True it is that the manager is appointed jointly by the Board and the share holders, and his appointment cannot be altered by the Board without reasonable cause, but on the other hand there must be some control over that manager, and it lies in the power given to the Board to reduce his salary just as the Board chooses. The amount of the salary is not fixed in the bye-laws, if the share holders wished that the salary should be held permanently like the appointment itself they would have said so in the bye-law. There is a distinction made by the bye-laws, that is, that the appointment is permanent, but the right to fix or alter the pay is vested in the Board without any restriction. I think that the words "il fixe leurs attributions et leurs rétributions" are not qualified by any restriction whatever. My learned brothers on the contrary think that there must be something reasonable in the action of the board, that that is not a power to be given to them in order to defeat the appointment by some evasive power of rendering it illusory, but as they hold also at the same time, that within the particular circumstances of this case the power was exercised reasonably, the consequence is that all the three judges agree in this, that the Board had the power under the circumstances then existing to reduce the salary to Rs. 150.

It has been argued that Mr. Lagreula made a protest, and that he being employed after that protest leads one to the presumption of fact that he was kept on the former salary of Rs. 400—such a presumption might be deduced from the facts if they were other than the present ones. Here it is shewn that the Board never had communication of the protest from Mr Lagreula, we are in the face of a decision of the Board reducing him and communicated to him, and we have no circumstances which might be brought home to the Board of Directors itself from which it might be implied

that they allowed him to go on under the old salary. It is shown that Mr Toulet on the contrary, wrote to Mr. Lagreula that he ought to change his mind, that the Board has not been able to meet. Subsequent meetings of the Board are shewn to have been for the purpose of calling a meeting of the shareholders probably with a view to liquidation, we cannot therefore from those facts see anything that will give any force to the presumption that the Company allowed Mr. Lagreula to work under the former salary, so as to defeat the previous resolution that the Board had communicated to Mr Lagreula that he could not be maintained at Rs 400; we have other circumstances existing about the time of those meetings, shewing that very far from being able to give Rs 400 a month, they would on the contrary have been induced still to lower the sum of Rs 150.

Under the circumstances, therefore we think that the judgment of the Magistrate was erroneous. We find that the sum which should have been given for six months ought to be Rs. 150 a month, which would amount to Rs. 900 in all. Certain sums have been taken by Mr Lagreula, he owed Rs. 694. 65 which being deducted from the Rs. 900 would give Rs. 205. 35, but the month of March being allowed in full makes Rs. 605. 31.

We therefore vary the Judgment of the Stipendiary Magistrate and give judgment for Mr Lagreula in the sum of Rs 605.31, but we think that Mr. Lagreula should bear the costs of the appeal, and as he wins on a part of his claim there will be no Costs in the Court below.

M. JUSTICE MURE :

I do not think I need add anything to what my learned brother has said. I think Mr. Lagreula's position in being fixed for ten years, must be held to be a position from which he could not be excluded. The Committee however are entitled to a certain control, but that control must be reasonably exercised, and not in an illusory manner. I do not think I need add one word more.

M. JUSTICE ROUILLARD :

I have nothing to add. The Chief Judge has expressed the opinion which I entertained and which I communicated to him.

### SUPREME COURT

*Damages for breach of promise of marriage, and imprisonment in the event of non-payment of damages awarded.*

ATISSE & ANOTHER—Plaintiffs

versus

LEBON—Defendant

Before

His Honor E. PELLEREAU—Acting Chief Judge

His Honor A. MURE,—Second Puisne Judge

and

His Honor J. ROUVILLARD—Acting Puisne Judge

PIERRE LÉONCE CHASTELLIER } Counsel for  
and }  
YVES JOLLIVET } Plaintiffs.  
V. G. DUCRAY—Attorney for the same

VICTOR K/VERN—Counsel for Defendant  
EVENOR GANACHAUD—Attorney for the same

Record No. 21,830.

31st October 1883.

The Court delivers judgment for plaintiffs in the sum of Rs 1,000 (one thousand rupees) with Supreme Court costs. Defendant to undergo two calendar month's imprisonment unless the amount be sooner paid. By Paragraph 2 of Article 4 of Ordinance 16 of 1869.

### SUPREME COURT

APPEAL BY A WIFE WHEN NOT AUTHORISED BY HER HUSBAND TO INSTITUTE PROCEEDINGS.—COURT MAY AUTHORIZE A WIFE TO PROCEED AT ANY STAGE.—AT WHICH STAGE AUTHORITY IS REQUIRED.

*This is an appeal by Gentrac the wife made under the following circumstances.*

*One, Mr. E. Chauvin moved before the District Court of Port Louis for the validation of attachment lodged by him against certain sums of money in the Commercial Bank alleged to belong to Mr. and Mrs. Gentrac.*

*During the course of the proceedings, Mrs. Gentrac alleged that the money sought be attached was her sole property, and not the joint property of her husband and herself. The Magistrate decided against her application. From this decision she now appeals.*

*The Respondent challenged the competency of the Appeal on the ground that the Appellant was not authorised by her husband, or the Court of Justice, to institute these proceedings.*

*Held that it is not necessary that a married woman should be authorised until she appears before the Court, and that the Court can authorise a married woman to go on with an appeal at any stage of the proceedings.*

*In the present case, in the interval between the Appeal and the hearing of the same, the Appellant had been divorced from her husband, and she was then a free woman.*

*The Court held therefore that she no more required the authority she could have obtained had she not been divorced.*

*Objection repelled.*

GENTRAC THE WIFE.—Appellant

versus

GENTRAC THE HUSBAND.—Respondent.

Before

His Honor ETIENNE PELLEREAU.—Acting Chief Judge

and

His Honor ANDREW MURE,—Second Puisne Judge

**T. L. JENKINS**,—Counsel for plaintiff  
**H. THATCHER**,—Attorney for the same

**V. DELAFAYE**,—Counsel for the defendant  
**E. LEBLANC**,—Attorney for the same

Record No. 790

15th November 1883.

*Appeal from judgment of District Magistrate.*

Delafaye for respondent has an objection to the competency of the appeal, states that this is an appeal by one of the defendants in the case of *Chauvin versus Gentrac* and wife, in which judgment was given against plaintiff, and that the wife had no authorization of her husband or of a Court of justice (Article 215 of the Civil Code) to institute proceedings in appeal, and cites in support of his argument *Sirey* 1840 part 1 page 768; *Sirey* 1862 part 2 page 154, *Sirey* 1878 part 1 page 341, and *Sirey* 1879 part 1 page 252.

**Mr Justice Pellereau** :—We do not think it is necessary to call on the appellant. The decisions of the Court of Cassation go to this length, that at the time when the married woman is before the Court, the Court can authorize her to go on with the appeal, and this not merely at the beginning but even at the time of the Court's giving its decision on the merits. The deduction to be drawn from the principal there laid down is this; that it is not necessary that there should be an authority before the proceedings for the appeal have been entered into, in fact all the procedure that passed before the appeal, had for its object the hearing of the case on the appeal, the time when the woman can be called upon to "ester en jugement" is really when she is before the Court, and every thing preliminary tends merely to the hearing of the case before the Court. The authorities cited, shew that it is to the time when she is before the Court that we must refer in order to ascertain whether she ought to be authorized, and it is sufficient that she should be then authorized.

That being so we are entitled here to authorize the married woman who has not obtained a proper authority to appeal, without going into the question whether the authority given in the Court of first instance, would be sufficient to enable the woman to go on with the

appeal. Therefore we must refer to that moment to see whether she is incompetent to go on, it is to that moment that the authority must apply, at this moment she is incompetent. She has been divorced in the interval; she is now a free woman, she comes forward having full power to act; she adopts every thing she has done before, and she no more requires the authority which she could have obtained now, if she had not been divorced. The law is made for the protection of the wife as well as for the protection of the husband, and is not to be interpreted so as to prejudice her. The authority is no more required, she is fully able to have a judgment in her favor, or a valid judgment may be given against her. We therefore, think that the point taken should be repelled.

It is needless for us to wait for the merits, to come to a decision on the point because in fact we need not inquire whether she is right or wrong on the merits. A fact has happened in the interval which frees her from her marriage, she is now quite capable of appearing before a Court of Justice, and on that fact she can say at this moment she no more requires the authority, and as we are certain the authority is no longer required, we repel the objection without waiting for the merits.

**SUPREME COURT**

THIS IS AN APPLICATION FOR VALIDATION OF AN ATTACHMENT LODGED BY THE PLAINTIFF AGAINST CERTAIN SUMS OF MONEY DUE TO THE DEFENDANT.

*A previous judgment on this case was delivered on the 7th September 1883. (See page 132 of this volume.*

**F. LOUSIER**,—Plaintiff

*versus*

**V. MONTOCCHIO**,—Defendant

Before

His Honor A. MURÈ,—Second Puisne Judge

and

His Honor J. ROUVILLARD,—Acting Puisne Judge



V. KIVERN,—Counsel for Plaintiff  
E. GANACHAUD,—Attorney for the same

H. GALÉA,—Counsel for Defendant  
P. F. LASTELLE,—Attorney for the same

Record No. 21,989

20th November 1883.

In this case we find that the sum due by the defendant to the plaintiff under the transfer by Boullé to the latter in name of principal interests and costs as at the fifteenth November one thousand eight hundred and seventy eight, amounted to four thousand three hundred and thirty three rupees and eighty cents .....Rs. 4,333.80

At that date of fifteenth November one thousand eight hundred and seventy eight, Widow de Bissy under a compromise with the plaintiff made a payment to him of about one thousand and four hundred rupees, but we are of opinion that the whole amount of the claim in principal and interest should be debited against the plaintiff, therefore there falls to be deducted the sum of two thousand and four rupees and twenty three cents. .... 2004.23  
to this has been added interests at the rate of nine per cent (9 o/o) 2329.57  
per annum from the said fifteenth (15th) November one thousand eight hundred and seventy eight (1878) to eighth (8th) November one thousand eight hundred and eighty three (1883) amounting to one thousand and forty four rupees and twenty three cents. .... 1044.23

making the whole sum due three thousand three hundred and seventy rupees and eighty cents..Rs 3373.80

which sum we find due by defendant to the plaintiff and to that extent we validate his attachment.

We may mention that the sum of two thousand and four rupees and twenty three cents (Rs. 2004.23) the amount of the debt of widow de Bissy, consists of the capital sum one thousand seven hundred and eighty three rupees and ninety two cents (Rs 1783.92)

and interest from first July one thousand eight hundred and seventy seven, the date of the obligation, up to the said fifteenth November one thousand eight hundred and seventy eight, two hundred and twenty rupees and thirty one cents (Rs 220.31).

With two thirds of cost to the plaintiff.

## SUPREME COURT

DISSOLUTION OF MARRIAGE.—“*RULE NISI*”  
RECONCILIATION OF PARTIES. — REQUEST  
THAT DECREE *NISI* BE REVERSED.

*The Defendant in this case was found entitled to a dissolution of her marriage on ground of cruelty, and a decree nisi was pronounced: the parties subsequently became reconciled and the husband moved that the Court should reverse the decree, and dismiss the petition—the wife appearing and consenting.*

*Held that the marriage is not dissolved by the rule nisi—but at the same time the Court cannot reverse the decree.—Ordered that no further proceedings be taken in this Court, and all further proceedings in this suit are stayed.*

DOOKEERAM the husband—Plaintiff

versus

DOOKEERAM the wife—Defendant

Before

His Honor A. MURK—Second Puisne Judge

and

His Honor JOHN ROUILLARD Acting Puisne Judge

W. NEWTON,—Counsel for plaintiff  
H. BERTIN,—Attorney for the same

T. L. JENKINS—Counsel for defendant  
G. BEULLOUX—Attorney for the same.

Record No. 21,961

20th November 1883.

This is a motion made by the husband against whom a rule "nisi" was pronounced on the 26th July last, that the Court should reverse that decree and dismiss the petition.

This motion is made in peculiar circumstances: Dookeram the wife was found entitled to a dissolution of her marriage on the ground of cruelty and a decree "nisi" was pronounced on the above date. After more than three months had expired, the husband came forward and making the above motion, explained that he and his wife had become reconciled, and that she was again living with him as his wife. The wife being in Court stated in answer to inquiries of the Court through an interpreter, that "she had become reconciled to her husband that she was living with him and intended remaining with him, she said further that she had taken a divorce against her husband but that she wished it all wiped away."

The Substitute Procureur General to whom notice of the motion had been given objected to its competency, and founding on article 13 of Ordinance 37 of 1882, maintained that the marriage was still in subsistence and that the decree could not now be reversed by the Court.

Lord Cairns in the case of *Prole vs Loady* ch. app. L. R. Vol. 3, page 220 said: "I am of opinion that according to the act it is impossible to hold otherwise than, that the order "nisi" is the decree which the Court eventually makes absolute against the party."

It is clear that the marriage is not dissolved by a decree "nisi" merely, which is only an inchoate step to be made perfect by the subsequent decree absolute.

At the same time the Court cannot reverse a decree which was justly obtained at the time, merely in consequence of events which had subsequently transpired. On the other hand it would not be expedient that on the first marital quarrel, which may occur, Dookeram the wife could be able to recur to this Court, and move that the decree "nisi" should be made absolute; as both parties have so acted as to show that they are perfectly reconciled, and as the wife has formally stated this to the Court, we order that no fur-

ther proceedings be taken in the above Court. All further proceedings in the suit are therefore stayed.

We may say that this was the course followed by Sir C. Cresswell in *Lewis vs Lewis* 30 Law journal P. M. & A. page 199, in a case exactly analogous to the present, and we think it expedient to follow the precedent given by that eminent Judge.

### SUPREME COURT.

SALE OF LANDED PROPERTY UNDER A PRIVATE WRITING—ORAL PROOF OF PAYMENT OF PURCHASE PRICE.

*The Plaintiff and Defendant were joint owners of a landed property in Port Louis.*

*The plaintiff alleges that he bought from defendant his share, and produces a document granted by Defendant to plaintiff in which the former acknowledges that he had sold to the plaintiff an undivided half of his property, and binds himself to go before a Notary and put himself en règle.*

*The defendant contended that the document was merely a promise of sale—that there was no presumption that money had passed between the parties, and that therefore there can be no commencement of proof by writing.*

*The Plaintiff urged that the sale had been completed and perfected and that as a consequence the price must have been paid.*

*Held that it was to be presumed the price was to be paid before a Notary on production of the certificate that the land was free from encumbrance.*

*That with reference to the document oral evidence cannot be admitted to prove commencement de preuve par écrit, so that payment of the price must be presumed and oral proof of it must be allowed.*

ADAM HAJEE ESSACK—Plaintiff

versus

HASSAM AYOUB—Defendant

Before

His Honor A. MURE,—Second Puisne Judge

and

His Honor J. ROUILLARD,—Acting Puisne Judge.

—

V. DELAFAYE—Counsel for plaintiff  
E. LEBLANC—Attorney for the same.

H. GALÉA,—Counsel for defendant  
A. DESVEAUX—Attorney for the same.

—

Record No. 22,100.

23rd November 1883.

Mr Justice Mure :

In this case the plaintiff and the defendant were, previous to the transaction which is the question at issue between them, undivided co-owners of a subject situate at 21, La Paix street, Port Louis ; and it appears that some transactions or negotiations with a view to a sale had taken place between them which resulted in this : that on the 11th of April 1882, a document was granted by the defendant to the plaintiff, in which he acknowledges that he had sold to the plaintiff an undivided half of his property ; that is, the share of the property accruing to him, to the plaintiff, and binds himself to go before a Notary for the purpose of putting himself "en règle" with the plaintiff. This document is produced to us, and it is upon this document alone that the argument to-day was submitted to us. The legal effect of the document is in question.

On the one hand, it was contended that it proved that a sale has been perfected and completed, and that as a part of a perfected and completed sale the price must have been paid, and that the seller binding himself to go before the Notary, must be considered to have given a perfect and indefeasible title to the plaintiff.

On the other hand the defendant maintains that the document is to be regarded merely as a promise of sale, and that there is no presumption of any kind to be derived from it that any money has passed between

the parties, and that therefore, there can be no commencement of proof by writing in this case.

It is to be observed that a contract of sale consists of two parts especially distinguished by lawyers. In the first place there must be a subject definitely fixed and known, which is the subject of the contract between the parties, in the second place, all lawyers have laid it down that the contract of sale shall be complete as far as the subject is fixed and the price between the parties has been fixed.

Now, does this document which we have here raise a presumption of the payment of money ? It has no reference to that part of the subject whatever. It does seem strange that if the money had been paid before the document had been granted, a reference to that matter should not have been contained in the document. It is equally strange that if a sum of Rs 1,083—for that is the sum which is alleged to have been paid—had been paid subsequently to the document, no receipt was taken for it between the parties. Looking at the course of events between buyers and sellers of property in this Island, and looking to the probabilities of things, I think it impossible to hold from the mere wording of this document, that there is any presumption of payment to be derived from it. It seems to me, in the first place, that the first part of the document, may refer merely to the completion of the contract of sale, as between the parties ; not to the actual execution of the sale in the least degree "I acknowledge to have sold the subject" refers, as I say, to the actual completion of the contract, but not in the least degree to the performance of the contract. Then if we come to the subsequent part of the document, I think the argument which was most ably drawn from it by the learned Counsel for the plaintiff here is not well founded. He argued very strongly that from the fact of the grantor of the document, binding himself to go before a Notary to place himself "en règle," it was to be deduced that Ayoub alone had to perform some duty, under the contract. Let it be observed that both parties to that contract are to appear before the Notary, and both parties have something to do before the Notary ; undoubtedly it was meant that the Notary was to give an, indefeasible and absolute title to the purchaser ; so, on the other hand, I think, it is to be presumed that the price was to be paid before the Notary, on the production of the Notary's certificate that the subject was free

DECISIONS  
OF THE  
SUPREME COURT, VICE-ADMIRALTY COURT  
AND  
BANKRUPTCY COURT  
OF  
MAURITIUS

ARRÊTS  
DE  
LA COUR SUPRÊME, DE LA COUR DE VICE-AMIRAUTÉ  
ET DE  
LA COUR DES FAILLITES  
DE  
L'ÎLE MAURICE

1883

PART XII

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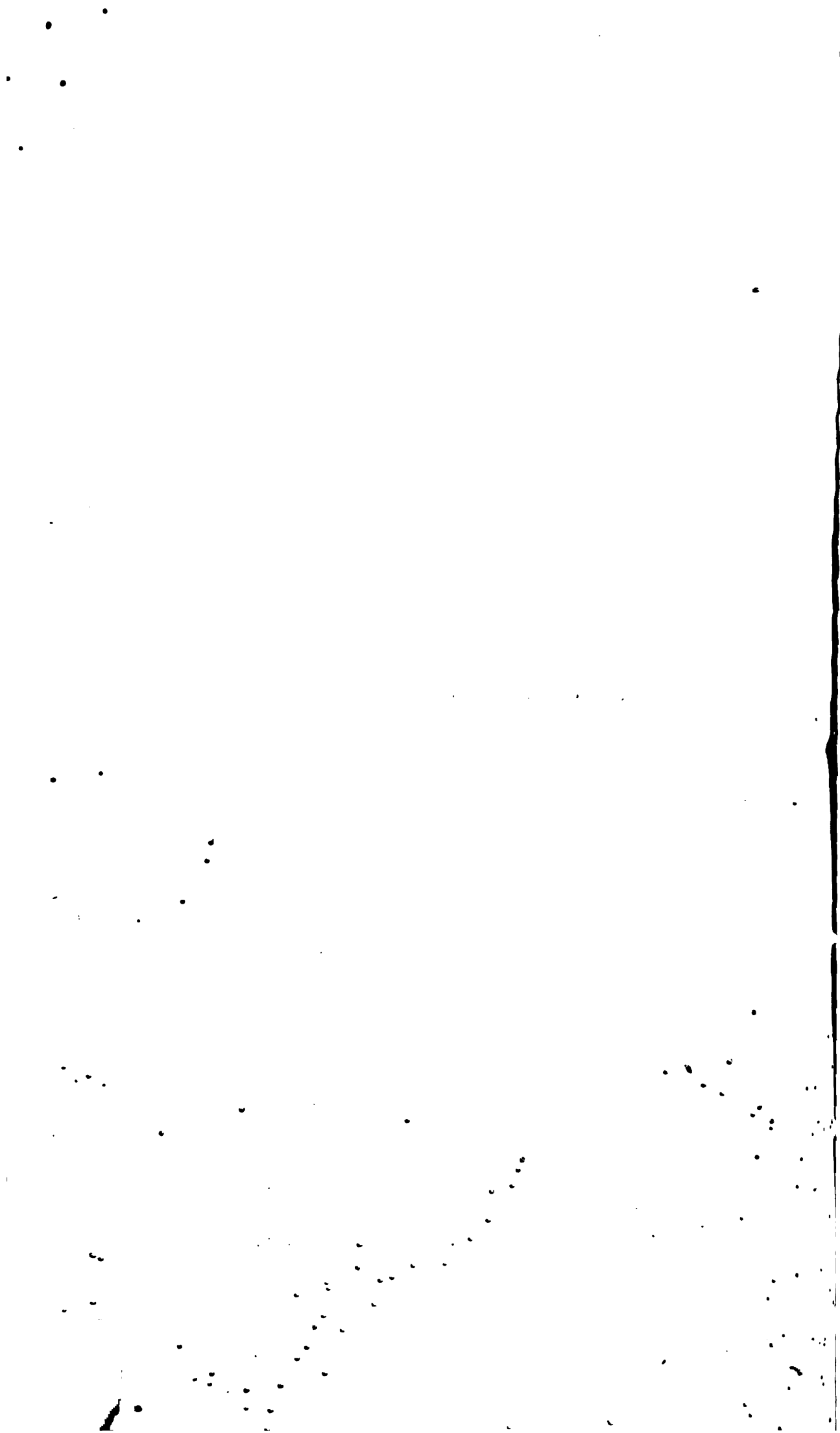
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ADVOCATE

AND  
NORTH HALL  
CHIEF CLERK PROCUREUR GENERAL'S OFFICE.

MAURITIUS :

GENERAL STEAM PRINTING COMPANY, GOVERNMENT STREET

1884



from incumbrance, and from those legal and other mortgages which are possible according to the law of this country. There remains only another matter. I think it is inconceivable that a person who paid this sum of money, should have done so without a certificate of the Conservator of Mortgages being presented to him, of the state of the subject in that respect; and that the sum was paid without writing intervening between the parties seems equally inconceivable, and that the payment should not have entered into the document that was prepared between them, seems to be equally remarkable. But from all these things, we cannot hold that there is any presumption to the effect contended for by the plaintiff. It was alleged also that the plaintiff was in possession of the subject, and that being in possession of the subject, the presumption of payment arose, but it is to be observed in the first place, that there was an absolute denial of that fact by the other side. It is clear that the presumption could only arise if it were an admitted fact. In the second place, in the notice of facts given by the plaintiff to the defendant, that allegation is not made, and in the third place, there is a document served by the plaintiff on the defence some short time back, in which it is made a subject of complaint, that he is illegally and improperly collecting the whole rents of the property; that allegation is not in such a position as to give rise to any presumption here. These parties are the undivided co-owners of the property; as such, they are both legally in possession of the subject, and that one of them may collect the rents, that may arise from some previous arrangement between the two.

I think no presumption can be drawn from that matter in any way, and certainly not with reference to the allegations of the plaintiff. That being so, we are of opinion that "hoc statu" and with reference to that document, oral evidence cannot be admitted by the Court to prove "commencement de preuve par écrit" so that payment of the price must be presumed, and oral proof of it must be allowed.

### SUPREME COURT

APPEAL FROM STIPENDIARY COURT, MOKA—  
SALARY OF OVERSEER.—CHANGE OF WORK  
OF OVERSEER WITH HIS CONSENT.

*This is an appeal from a decision of the Stipendiary Magistrate of Moka.*

*The Defendant in this appeal was an outdoor overseer on one of appellant's Estates, "Rose-lyn Cottage" at Moka, at a salary of Rs 40 a month: on the 7th September 1883, the Appellant was informed that his place on the Estate was to be taken by a Mr. Hitid.*

*The Defendant called upon the appellant stated he was a poor man and had a family, when the Appellant agreed to give him another trial as an indoor employé.*

*Some days passed when Defendant returned to Appellant, and stated that on reflexion he found that he could not work indoors, and insisted upon the terms of his original contract. He was not allowed to resume his original duties as an outdoor overseer; and laid a complaint before the Stipendiary Court, claiming one month's wages for September at the rate of Rs 40 per month.*

*The Stipendiary Magistrate gave judgment in his favor, and against this judgment Mr. Hewetson appeals.*

*The Court held that as the Defendant to this appeal had consented to accept another situation, he could not insist upon being employed as an outdoor overseer.*

*That as he had worked for 17 days on the Appellant's Estates, he was entitled to salary for that period, but for no greater period.*

*Each party to bear his own costs.*

HEWETSON.—Appellant.

versus

REGNAUD.—Respondent.

Before

The Honorable E. PELLEREAU.— Acting  
Chief Judge

and

The Honorable ANDREW MURE.— Second  
Puisne Judge.

W. NEWTON,— Counsel for appellant.  
W. HEWETSON,— Attorney for himself

A. HUGUES,—Counsel for Respondent,  
T. NICOLAS,—Attorney for the same.

Record No. 99.

4th December 1883.

*Mr. Justice Mure:*

In this case, which was a plaint with summons in the Stipendiary Court of Moka, the plaintiff Regnaud asks for a judgment for one month's salary of Rs 40, for the month of September of this year. The action was raised on the 18th of September, but the sum claimed was for the whole month.

The defence in the lower Court was that the defendant was not indebted, and that the plaintiff was removed from the "Roslyn Cottage" Estate for misconduct, disobedience to orders, and refusal to work.

It appears that the plaintiff had engaged himself to work with the defendant on the Estates "La Laura" and "Roslyn Cottage", and that the nature of the engagement was what I shall now detail. He had come there saying he was tired of working indoors, that he had been an accountant on an estate, that he knew all the work of an Estate overseer, and could do any other work that was necessary, but that the state of his health was not such as enabled him to work in-doors, and he wished outside employment.

The defendant, Mr. Hewetson, in speaking to him on the subject, stated, according to his own account, that he had only room for a common overseer at Rs 40 per month. On the other hand, the plaintiff and the only witness called by him, Mr. Apaty, made it quite certain that the plaintiff engaged with the defendant to work as an overseer in the field, and I think this is not left in doubt even by the third parties, the witnesses who were present. The evidence of Froget, who was an overseer on "La Laura" Estate, and who was present, comes to the same thing, it is put in somewhat different language—but it is that the defendant made it a condition that he should be employed as an overseer working out of doors. The man entered upon his engagement on the 1st of June, and continued during the months of June, July and August, to work apparently without objection. During that time three small matters occurred, which were not noticed at the time; in the first place

it seems to be a rule on the defendant's Estates, that all his *employés* should have *carrets* or memorandum books, in which to notice the various facts connected with their employment for the day. He was not supplied with a carnet and he worked for some days without one,—and the defendant now says that that is a fault which is entitled to be taken into consideration. With that I cannot agree; it seems to me that the fault was as much that of the defendant himself, who did not supply the man with a carnet, as of the plaintiff. He took his notes upon paper, which were communicated in the ordinary way to the parties, to whom the Carnet would have been submitted. In the next place, it is said that he employed laborers on Sunday to work in a large garden behind his house. Now it appears that these men were working in this way for him at a time when they would not be allowed to work on the Estate, for the Labor Law lays down quite clearly that the Sunday labor of Indian laborers upon Estates, is to be limited to a couple of hours in the morning, and to be of a light character, and to end at eight o'clock. I have no doubt that those Indian laborers, knew perfectly well that they gave it to the plaintiff of their own free will, perhaps because he was in such position that they wished to oblige him;—but I cannot consider it as a fault on the plaintiff's part for which he is entitled to be dismissed—it being passed by at the time. It also appears that he used some materials to paint the house belonging to the defendant, in which he was allowed to live on "Roslyn Cottage" Estate. This was not noticed at the time, and I think the relation of master and servant is such, that there must be constantly transactions on the part of the servant, in which he needs guidance and direction, and if a matter of this kind occurs, and the servant does it for the purpose of preserving the property of his master, and if it is passed by and not noticed, it seems to me that thereafter it would be wrong to make it a ground of misconduct, and a reason for refusing to pay wages. But in reality the case to my mind does not turn upon these points. They are afterthoughts on the part of the defendant. The plaintiff's work went on for three months when on the 7th of September, the manager of "Roslyn Cottage" Estate received a letter handed to him by one Mr Hitié, from the defendant, informing him that Hitié would take the place of the plaintiff as overseer on "Roslyn Cottage" Estate. This letter was shewn to the plaintiff, who thereupon naturally enquired within himself what he was to do—and in the afternoon of that day, he went up

to see Mr Hewetson at "La Laura"; now it is important in the determination of this case, to observe carefully what took place upon this occasion. In this case, in which a great many Indian witnesses and servants of Mr Hewetson have been examined, it is difficult to attain an exact appreciation of what is truthful evidence, and what is not truthful evidence. With reference to the evidence of Canal, the sub-accountant, we have the very important fact stated by the Stipendiary Magistrate, that he seemed to be a truthful witness—as to what took place on the 7th of September, he says this: "Witness is aware that some time back defendant decided to remove plaintiff from "Roslyn Cottage", and one Mr Hitié was to replace him. Recollects on 7th September last Hitié came to the manager Apaty, with a letter from the defendant. In the afternoon of the same day, plaintiff came to defendant and asked him why he had been dismissed, and he explained to the defendant, that he was poor and had a family to support. Defendant replied all my work has been spoilt at "Roslyn Cottage", nevertheless I will try you again. Can you manage the work of the mill? Plaintiff said yes, he knew the work, defendant then told him to remove his effects to "La Laura" Estate, there was room in the house, and plaintiff thanked defendant, and he was told to take the work of the sugar house the next day, which he agreed to do."

Now, let it be observed that the contract between these parties was a verbal contract, and that it may be superseded by another verbal contract, that circumstances had occurred which, in the opinion of the defendant, made it expedient that he should employ another overseer on the Estate, and then the plaintiff has a personal interview with the defendant, in which what I have stated occurs. Canal is not the only witness who says that this change in the position of the parties was made, and that the plaintiff consented to transfer his services from the out-door overseer's employment, to the indoor work of the mill. The witness Raganath says: "The manager Apaty came and defendant said to Apaty that plaintiff said he could do the work of the mill. The defendant went away, and plaintiff came to the office and said to the manager that defendant had ordered him to go to the house at "La Laura", and work in the mill. The manager then said what are you going to work in the mill for Rs 40 for? you must demand Rs 80." From that evidence, I conclude that the evidence of Canal as to what took place on the 7th September

is well founded, but that is not all. Thomas Andrew Carr is examined, who, as a friend, seems to superintend the Cash accounts of the defendant's estates, and he gives this evidence, speaking of what took place on the 18th of September, when the quarrel had finally taken place between the parties. "The plaintiff one afternoon came for his salary about 4 p. m.—the defendant said if he did not do the work for which he was engaged, he had better send in his resignation, and defendant said you are engaged to work as an employé in the mill."

The plaintiff said "yes, but on reflection I find I cannot do it." This evidence is admitted to be true by the Magistrate, and if that be so, it seems to me impossible to come to any other conclusion than that the arrangement that was made on the 7th of September, as stated by Canal and Ragnauth, and by the defendant himself, must be held to be correct.

Now if that be so, the parties consented to change the nature of the employment of the plaintiff, and the plaintiff then consented to work, not in the field, but in the mill. However, a day or two passed, and then the plaintiff went to Mr Hewetson and said, "I have reflected over this matter and I have changed my mind, I cannot do what I said I would, I insist on working on the terms of my original contract". I am of opinion that this was a position he was not entitled to take; he had assented to the arrangements which defendant had made; he had agreed to work in the mill, and the defendant had made arrangements for him; and, after a house had been assigned to him on *La Laura* Estate, and he had been told to take his furniture there, and when Hitié was about to enter on his work, we are told that he changes his mind and insists in holding to his original bargain. Mr Hitié did not arrive till the 16th, but on that day the plaintiff saw that the defendant was in earnest in what he intended to do, and that he was to be superseded in his employment in the field, and he then goes up to make a last appeal to the defendant. At that interview he is paid the balance of his wages, and this takes place: the intimation is made to him that he was to work in the mill; he says he cannot do that, and he will not do it, and then the defendant says "you will leave." The next day the plaintiff endeavoured to continue his work as overseer in the field, but he got no orders, and the manager informed him that if his servant worked for him he was to be marked as absent, he saw there was no alternative, and as he had positively



refused and continued of that mind, he went off to the Stipendiary Magistrate and swore his information.

Now this matter is undoubtedly by a little delicate, but still I think it would have been a reasonable act on the part of the plaintiff, had he agreed to do his work in the mill, even though in-door work had not suited him, and though the sum he was paid was inferior to what an indoor overseer might be entitled to, and thus to have completed his month on that footing. But he does not choose to do so, and applies to the Stipendiary Magistrate at once, and raises the present question with the defendant.

The conduct of the cause has been somewhat peculiar. I think that what I have now said is sufficient to determine the real point at issue between the parties, and that the plaintiff was entitled to more than the 17 days work, if he remained on the *La Laura* Estate, but that as he did not do so he is not entitled to more, and for that the Court will give him judgment. But then the conduct of this case in the Court below is very peculiar. I have mentioned what the pleas of the defendant were, but he occupies a great deal of the time of the Court in proving those matters which, if it be considered that the plaintiff was to blame, that he erred in the course of his employment, do not go in the least towards the settling of the case, and a great deal of expense was put on the case which was quite unnecessary.

As to the judgment of the Magistrate, I must say that it does not betray any improper feeling, and does not disclose anything wrong in his part towards the defendant, and that, in short, the Stipendiary Magistrate writes such a judgment as is worthy of all respect, though I have differed from him to a certain degree in one respect. But when this case was appealed, very extraordinary pleas were put forward by the appellant, the defendant in the lower Court. On these I do not desire to make any comment whatever, except to say that I consider them perfectly impertinent to the issue between the parties; and that the Counsel for the appellant exercised a wise discretion when he did not comment upon them, and in effect withdrew them from the view of the Court, they ought never to have found place in the appellant's plea.

We therefore, give judgment for the defendant in the sum of Rs. 22.66, and beyond this extent we quash the Magistrate's judgment.

ment. As to the costs, considering the manner in which this case has been conducted in the lower Court, and the nature of the pleas that have been stated, and that the defendant has failed in proving any damage, and that the matter was one of some delicacy between the parties, and might have been avoided by a little forbearance towards each other, I am of opinion, and I believe my learned brother shares in my view, that costs should not be given to either of the parties, neither in this Court nor in the Court below.

—  
*The Acting Chief Judge :*

I quite agree with my learned brother. I need not go over the grounds of the decision again, but I wish to make only a very few observations on the question of indemnity in which the parties laid stress, namely, that Regnaud not having executed the contract which he had undertaken after the 17 days' work, to work on the "*La Laura*" estate, was bound to indemnify Hewetson.

The case of *de Touris v Hewetson* shows that the employer can claim an indemnity, but in that case the amount of the damage suffered was proved, but we have arrived at the conclusion that in this case it is not proved. The plaintiff in the Court below might not have been entitled to the Rs 22.66 for the 17 days, if the other side, the defendant there, had been able to prove that during the remaining days in which the plaintiff had not properly fulfilled his contract, he had suffered a prejudice of at least Rs 22.66; but he simply argued that he must have suffered some prejudice, and, therefore, we cannot set off anything against the Rs 22.66. The appellant has won on certain points, and on the other hand, the respondent wins to the extent of 17 days wages, the defence of Mr Hewetson in the Court below having been that the plaintiff was entitled to nothing. Under these circumstances, we think it is just that the costs should be compensated in this Court, and also in the Court below.

—  
**SUPREME COURT**

—  
**SUCCESSION.—THE SAME LEGACY REPEATED  
IN TWO SUCCESSIVE WILLS.**

*Mrs. E. Desmarais, widow of E. Perrot, died on 30th March 1883.—Amongst her papers*

*were found two wills dated 18th November 1880 and 29th November 1882. In the first will, a legacy of 400 Rupees is made to Marthe Nozaïc, Mrs Perrot's God-daughter — and in the second will, this legacy is repeated in exactly the same terms to the same person.*

*The plaintiff contended that the deceased intended to leave two legacies to her God-daughter i. e. 800 Rupees. The Defendants are disposed to pay one legacy of Rs 400, but argued that the second will is but the repetition of the first.*

*After comparing the wills, the Court held that the legacy made to Marthe Nozaïc in the second will, is only the repetition of the legacy contained in the first will.*

—  
NOZAÏC — Plaintiff

versus

DESMARAIS and OTHERS — Defendants.

—  
Before

His Honor A. MURE, — Second Puisne Judge

and

His Honor JOHN ROUILLARD Acting Puisne Judge

—  
V. K/VERN — Counsel for plaintiff  
EVENOR GANACHAUD, attorney for the same

W. NEWTON, Counsel for Defendants  
HENRY LECLÉZIO, attorney for the same

—  
Record No 22,062

5th December 1883.

—  
Mrs. Euphémie Desmarais, widow of the late Henri Perrot, died in Mauritius, on the thirtieth March of the present year.

Amongst her papers were found enclosed in an unsealed envelope, two wills, dated res-

pectively eighteenth November one thousand eight hundred and eighty, and twenty ninth November one thousand eight hundred and eighty two.

In continuation of the first will is a codicil dated twenty fourth July one thousand eight hundred and eighty two, the provisions of which are unimportant in so far as they bear on the question at issue between the litigants.

Inside of the envelope above described was found a slip of paper containing a list of debtors of the deceased, and notes in ciphers relating evidently to legacies made or to be made by the testatrix.

In the will under date the eighteenth November one thousand eight hundred and eighty, a legacy of Rs. 400 or \$ 200 is made to Marthe Nozaïc the God-daughter of the testatrix — in the will dated nineteenth November one thousand eight hundred and eighty two, a legacy of \$ 200 or Rs. 400 is made in exactly the same terms, to the same person.

It is contended by the plaintiff, Félix Nozaïc, who acts as legal administrator of the Estate of his daughter under age, Marthe Nozaïc, that these are two distinct legacies, and that, under the two wills above referred to, Marthe Nozaïc is entitled to \$ 400 or Rs. 800.

The defendants, on the other hand, are ready to pay the amount of the legacy of Rs. 400 under the will dated twenty ninth November one thousand eight hundred and eighty two, — but they refuse payment of the legacy under the will dated eighteenth November one thousand eight hundred and eighty, alleging that the legacy to Marthe Nozaïc made by the second will, is only a repetition of the legacy made by the first will — the clear intention of the testatrix having been to make to Marthe Nozaïc only one legacy to the amount of Rs. 400.

The case was fully argued before us, and authorities were cited on both sides.

It seems to the Court that precedents of cases, having more or less analogy with the circumstances of the present case, have not so much importance as the question, whether it is possible from the facts and documents before the Court, to determine what was really the intention of the testatrix.

After careful consideration, the Court has no hesitation in declaring that the legacy

made to Marthe Nozaïc in the second will, is only the repetition of the legacy contained in the first will.

Apart from the document above alluded to, in which is found a list of legacies corresponding with the legacies made in the second will, which by itself would constitute a strong presumption that the second will was, in respect of the legacies contained in it, the last and definitive will of the testatrix, the comparison of the two wills alone, enables the Court to come to its opinion as above expressed.

It is to be noticed in the first place that several erasures have been made in the first will, by the same hand which wrote the body of the will. The amount of several legacies has been varied, and in some cases the nature of the legacy has been altered.

Now in the second will, all the additions and modifications which occur in the body of the first will are reproduced, mostly in the same terms as in the original deed.

This undoubtedly shows that the second will was meant by the testatrix to be the copy of the first, after its having been modified. But there is more. The legacy made to Marthe Nozaïc is not the only one which is reproduced from the first will into the second—all the legacies of sums of money, and even of articles of jewellery and of furniture which are to be found in the first will, are reproduced *verbatim* in the second will. If Marthe Nozaïc is entitled to a double legacy, so would all the other legatees.—All this leaves little doubt in our minds that the testatrix having resolved to make another will, complete in itself, used the first will as a draft for the second. It follows that she did not mean the legacies, which are mere repetitions of those in the first will, to be cumulative.

The judgment of the Court is therefore, that Marthe Nozaïc can only obtain the legacy of \$ 200 or Rs. 400 as per the second will. As for the costs, there being heirs under benefit of inventory, a judgment of the Court would have been necessary to obtain payment whether of a legacy of Rs. 400 or of Rs. 800, the plaintiffs shall therefore obtain from the defendants such costs as may be allowed in an uncontested demand before the Supreme Court for Rs. 400, but the costs of the discussion which has arisen in consequence of the plaintiff having claimed Rs. 800 instead of Rs. 400, to which he was really entitled, will have to be borne by him.

## SUPREME COURT

REVIEW OF DECISION OF JUDGE IN CHAMBERS DIRECTING DEPOSIT AND INSPECTION OF TRADE BOOKS. — REPRESENTATION AND COMMUNICATION OF BOOKS UNDER CIVIL CODE.

*This is an Application for the review of a Judge's order, upon an application for inspection and leave to take copies of certain documents, and for leave to deposit those documents in the Supreme Court, in support of an action for contravention of the Law as to Trade marks.*

*The Appellants in the first place urged that the matter was beyond the jurisdiction of a Judge in Chambers.*

*Held the Judge in Chambers was competent.*

*It was also argued by the Defendant, that in this special case the Judge in Chambers having referred the matter to the Supreme Court, his jurisdiction in the matter was exhausted.*

*Held that the Court had merely ordered the amendment of the original application, and had not thereby deprived the Judge in Chambers of his jurisdiction in the matter.*

*It was further argued that under the Civil Code, the representation of Books is not allowed, and the difference between representation and communication of Books under the Code was distinguished.*

*This point was over-ruled and the inspection of the Books was allowed by the Court.*

*It was also contended that there was danger in producing the Books, and that was giving publicity to the affairs of the parties and divulging secrets—that the books and documents might incriminate the parties—that the documents do not belong merely to the parties mentioned in the suit but to others. That the Judge in Chambers had no right to appoint a judicial officer to inspect the Books.*

*Ruled that the Judge at Chambers was quite right in giving the order for inspection and to take copies, but the Court vary the order by declaring that it shall take place upon oath, before the Master who shall cause extracts to be made.*

**ROLLAND & PAULY**—Plaintiffs*versus***WEDELES & Co. and ors**—Defendants—  
Before**His Honor E. PELLEREAU**,—Acting Chief Judge

and

**His Honor J. ROVILLARD**—Acting Puisne Judge—  
**P. L. CHASTELLIER**,—Counsel for plaintiffs  
**A. ROLANDO**,—Attorney for the same**T. L. JENKINS**, } Counsel for defendants  
**V. K. VERN**, }  
**A. ROHAN**,—Attorney for the same—  
Record No. 22,042

5th December 1883.

## JUDGMENT

*His Honor the Acting Chief Judge :*

This is an application for the review of a Judge's order given on a certain application for inspection and leave to take copies of certain documents, and for the deposit of those documents in the Registry of the Supreme Court.

The Judge at Chambers granted the application and the matter comes here for review.

The first point taken by the appellant is that the Judge at Chambers had no jurisdiction whatever, but by rule 33 of our General Rules and Orders, there is no doubt that all applications for inspection and for taking copies must be made before a Judge at Chambers, so that he has original jurisdiction. In England, a Judge alone can deal with such questions, but I cannot take that as a precedent for Mauritius, because in England a Judge has the full jurisdiction of the Court. The local Rule 33 says that :—

"The Judge at Chambers can order a copy or inspection of any deed, agreement, bill

"or other written document mentioned or referred to in his pleading or whereof inspection could be obtained by a bill of discovery." Therefore the Judge at Chambers is competent, but it was argued also that, in this special matter, the application had been referred to the Court by the Judge at Chambers originally, and that he had exhausted his jurisdiction by transferring it to the Supreme Court. We find, upon the reference made to the Supreme Court, that the Court has given a decision upon the application; that decision was not in itself sufficient to enable the Court to carry into effect the wishes of the plaintiff, and the decision was that an amendment be made.

The Court dealt with the application by ordering it to be substantially amended.

We do not think that, under the circumstances, the Judge at Chambers had no longer jurisdiction. By rule 33 he has jurisdiction given to him. Exercising that jurisdiction he refers the matter to the Court; the Court deals with it in a certain way and orders an amendment; the amended application is not at all the original application, and it cannot be said therefore, that, in that amended application, an order had been given by which the Judge had divested himself of the jurisdiction. We therefore overrule that point also.

It was further argued on behalf of the appellant that, under Art. 14 and 15 of the Code of Commerce, the representation of Books is not allowed. There is a difference made in that Code between the representation of books, and the communication of books. The communication takes place by depositing the documents in the Registry where the parties can take cognizance of them, read them through and take copies.—This communication is allowed by the Code of Commerce only in certain cases, which are expressly mentioned. The representation which is regulated by article 15 is a different thing,—it can take place in any matter which gives rise to contestation, provided there be, in the books to be represented, something concerning the difference, and if the books are in a distant place, the Court may order their presentation to a neighbouring Judge or Justice of the Peace. Those are two very different cases. It has been argued that even representation should not be allowed in this suit. We think that it should be allowed. I think that the Code of Commerce in its 15th article is wide enough to cover a contestation like this—true

it is, it was suggested that it was only as between traders that that should be allowed, and it was also intimated that the Court had decided in the previous judgment that it should be allowed only as between traders; but, on reading that judgment, I find that the Court did not decide the point. I do not hesitate in giving my opinion to this effect that even in an action which is not commercial, or between parties one of whom is not a trader, the books of the trader, who is party to the case, may be ordered to be produced, and this is confirmed by article 14 of the Code of Commerce, in which it is said that all communication, which is much greater than all representation, may be ordered in matters of succession, which are essentially civil and not commercial. My learned brother does not I believe follow me fully to that length, but (I am speaking subject to his correction) he is of opinion that the article is silent with regard to a question of damages like this, and that, precisely because it is silent, Ordinance 15 of 1881 comes into effect. There is a section in that Ordinance which enacts, that in all cases not expressly provided for by the law of Mauritius, the law of evidence and the practice of the High Court of Justice in England shall be applied. As my learned brother considers that article 14 is silent on the point with regard to an action in damages like this, it is according to him the law of England which, by virtue of that ordinance, should be applied, and both my learned brother and I agree on this, that according to the law of England, there is no doubt whatever, the inspection of books and the taking of copies is allowed, as fully as possible in civil matters as well as in commercial matters, so that although our ways of arriving at the decision may be different, our conclusion is the same. This point will therefore be overruled.

It was, however, contended that there was a danger in producing the books, and that was giving publicity to the affairs of the parties, and divulging trade secrets. There is an express decision amongst those quoted by the parties. We can find no decisions other than those quoted by the parties, in which it has been ruled that the breach of a secret could not be considered as an objection to the right of inspection and of taking copies.— Besides, there is a means which we will adopt presently in order to prevent the useless divulging of a man's private affairs, and to prevent the inspection being insisted on for purposes which it would not be just to allow. Another objection was that the books and

documents might criminate the parties producing them, but Mr Chastellier for the respondents has restricted his demand, to the time from which the registration of the trade mark took place. It may be a question whether the right to damages can be based upon facts which preceded the registration of the trade mark, but there cannot be any doubt that any criminal offence against the law of trade marks, cannot be punished unless the offence has taken place after the ordinance which creates the offence, therefore there cannot be any criminating of parties on facts, which have taken place before the publication of that ordinance; and as the demand for inspection is restricted to that date, and what precedes there can be no danger in producing the documents. It was however, submitted by Mr. Jenkins that there was an article of the penal code, under which the parties might criminate themselves. We have read that article and we are of opinion that they cannot bring themselves within reach of it, it does not apply to the case, so there is no danger of their criminating themselves.

Another point taken was that the documents do not belong to Limonaire alone, but to other parties as well, all the authorities are very clear on the subject, that it is necessary in order that a party to whom a book or a document belongs in conjunction with others, can object to the production, that he should come forward and say so; but if that party says nothing, although he is not a party to the cause, it has been ruled in as clear a manner as possible that the inspection can take place and the copies ordered. In this case, besides, most of the parties are parties to the cause, and therefore the objection cannot at all apply.

It has been suggested that the Judge at Chambers had no right to appoint Mr. Gallet. We think that as the books of the firm containing private business will have to be inspected, it is better that a judicial officer should have the control of that inspection. In a case before the Courts in England, it was ruled and it has been acted upon, that the Court can take the document, look at it and see whether it applies to the point in contest, but we think that it is much better done by a judicial officer than any other, and however honest Mr. Gallet is, it is much better that it should be done by the Court, and if the duty is delegated, should be done by the Master, who will have the power, whenever there may be a contestation before him that a certain part of the book refers or not to the question, to look

into it to ascertain it, and if he thinks fit, keep it a secret to himself and not allow copies to be taken.

These being all the points that have been submitted, on the whole therefore our ruling will be this; that the Judge at Chambers was quite right in giving the order for inspection, and the order to take copies, but we vary that order by declaring that it will take place before the Master, and will take place upon oath. With regard to the documents and books themselves, we think there is some vagueness in the description, which should be corrected, for instance, paragraph 2 of the schedule is so broad and vague that it should not be allowed, and will be deleted altogether from the order of the Court. My learned brother will read the special form of the order.

*His Honor Mr Justice Rouillard :*

It is ordered by the Court that the Ledger books of Limonaire kept during the years 1879, 1880, 1881, 1882, down to the 18th May 1883 be deposited in the hands of the Master of the Supreme Court, who shall after inspection made by him, cause extracts to be made at the expense of the plaintiff, of such parts of the Ledgers aforesaid as relate to invoices or demands of paper having the mark Roiland or Rolland frères to be sent to this Colony by or through Wedelès & Co.

20. The Master of the Supreme Court shall, after inspection, cause extracts to be made from the said Ledgers, of the accounts between Limonaire and sundry Traders designated in the schedule, having reference to orders given by the said parties to Wedelès & Co. through Limonaire, or to Limonaire himself for paper to be sent to the said parties in Mauritius.

30. That the defendants shall produce all letters of Limonaire, or copies thereof to Wedelès & Co, relating to the aforesaid orders for paper to be sent to Mauritius by Wedelès & Co, for the account of Gunt and other traders designated in the schedule.

40. That the defendants shall produce all letters from Wedelès & Co, relating to the aforesaid orders for paper.

50. That the defendants shall produce all the documents enumerated in paragraph 6 of the schedule.

All productions are to be on oath.

We declare also that the demand made in paragraph 2 of the Schedule should not be entertained as being vague and indefinite.

Costs reserved.

## SUPREME COURT.

DIVORCE.—CUSTODY CHILDREN.—DIVORCE  
DATES FROM DATE WHEN DECREE NISI IS  
MADE ABSOLUTE.—ART. 302 CIVIL CODE.

*In this case the Plaintiff applies :*

10. That a decree Nisi for a divorce be made absolute.

20. That he be granted the custody of his Children.

*The Court makes the decree nisi absolute, and rules that by article 302 of the Civil Code, the Plaintiff who has obtained the divorce is entitled to the custody of the Children. reserving the right of the mother to come forward, and upon facts, apply for a change of custody.*

*On the question of the date from which the divorce dates, the Court held that it dates from the making absolute of the decree nisi.*

GENTRAC—Plaintiff

versus

GENTRAC—Defendant

Before

His Honor E. PELLEREAU,—Acting Chief Judge

and

His Honor A. MURE,—Second Puisne Judge

W. NEWTON,—Counsel for plaintiff

E. LEBLANC,—Attorney for the same.

T. LIONEL JENKINS,—Counsel for defendant

H. THATCHER,—Attorney for the same.

Record No. 21,922.

10th December 1883.

### JUDGMENT

*His Honor the Acting Chief Judge :*

In this matter the plaintiff who has obtained a "decree nisi" for a divorce has moved the Court to make it absolute. There has been a summons served to that effect, no objection whatever has been made to it, so the Court makes the "decree nisi" absolute and pronounces the divorce.

An application has also been made concerning the custody of the children. There is no doubt that by virtue of article 302 of the Civil Code, the party who obtains the divorce is entitled as a rule to the custody of the children. We think it does not matter whether the application be included in the application for the divorce or not. Article 302 regulates the effects of the divorce, and whether the application mentions those effects or not, they are the necessary consequences of the divorce pronounced. It was not necessary therefore to have made any such prayer. But we cannot say it would be wrong to include it in the petition.

The motion having been made after the divorce was pronounced for the custody of the children we shall simply rule on that application, that by virtue of article 302 the plaintiff, who has obtained a divorce, is entitled to the custody of the children. We say nothing as to the right of the other side to come forward hereafter and upon facts shewn to apply for a change of that custody. One point was mentioned in the course of the argument whether the divorce should date from the granting of the "decree nisi" or the "decree absolute". A clause was introduced in the local ordinance purposely to prevent any difficulty. The words "and the divorce shall be actually pronounced" are a colonial introduction, they do not exist in the British statute, and the reason why they are there is to meet the difficulty which might have arisen if there had been any doubt on the matter. If the divorce is referred back to the date of the "decree nisi", strange consequences would ensue, for three months it would not be known whether the parties were married or not. A woman might consider herself free from the date of the "decree nisi" and commit adultery. And if the "decree nisi" is refused afterwards that adultery would then retroac-

tively become criminally punishable. Again an application for a dissolution of community of property might be made in the three months, and could be wiped off if a decree absolute were refused. The Legislature was fully aware of all those difficulties, and it is to avoid them that the divorce is to be pronounced only on the making absolute of the decree by express words which have been introduced. Besides it was necessary to adapt the decree nisi to Ordinance 14 of 1872 and to the laws on the civil status. There is a chapter in the law of the civil status of 1872 which says what is to be done in case of divorce. Article 78 says "It shall be the duty of the Registrar of the Supreme Court within 8 days after a judgment of divorce has been pronounced to forward to the Registrar General a copy certified by him of such judgment. The judgment shall be entered verbatim in a special Register of divorce kept by the Registrar General and such entry shall be certified and signed by him as correct. It shall then be the duty of the Registrar General forthwith to cause a marginal mention of such divorce and of the date of the judgment thereof to be made upon the act of marriage of the divorced parties, and in both of the Registers in which the marriage has been inscribed."

If the divorce were to date from the decree nisi the consequence would be this, that the Registrar General would enter the decree as a divorce pronounced, and afterwards if the making absolute did not take place the parties would be undivorced. That is a state of matters which the Legislature has purposely wished to prevent, by putting the words "and the divorce actually pronounced" in the Section of the ordinance of 1882 which relates to it.

We, therefore in conclusion, make the decree absolute. We rule that the plaintiff is entitled to the custody of the children, but we say nothing with regard to the right of the defendant to come forward and apply for the custody either for herself or to be given to other parties.

*Mr Justice Mure :*— I am of the same opinion. The matter is of some importance, in as much as a new procedure has been introduced into the colony as to the effect of a decree nisi. On the point of making this decree absolute I have read the evidence carefully, and have simply to say that as there is no opposition the decree should be made absolute.

In reference to the important matter as to the position of the parties between the date

of the decree nisi and the date of the decree absolute, it has ever since the law was introduced into England, been the law of England that the parties were not divorced by the decree nisi. They remain married persons, and there is this passage on Browns' law of Divorce "After a decree of dissolution of marriage on the ground of adultery had been pronounced but before the time allowed for appealing against the decree had elapsed the wife married again held a void marriage." *Chicester* 32 L. J. M. & A., p. 147. In that case the decree nisi was pronounced and the system of procedure that then existed was, there was a right of appeal to the full Court against the judgment of the judge of Probate and Divorce Court. In that case the wife divorced had remarried before the time for appealing had expired, and married the person with whom she was charged with having committed adultery; subsequently that person brought an action to have that marriage declared null, and the Court annulled the marriage on the ground that the woman was still the wife of the man who had taken the procedure against her in the divorce court. In like manner at page 308 of Mr Brown's book the effect of decree nisi is stated. It seems that the effect of a decree nisi is such that the ligamen of marriage still continues during the interval between the decree nisi and the decree absolute, and that illicit connexion by either of the parties to the marriage in question is adultery.

Therefore it is that in the Probate and Divorce Court in England the person divorced has, after the decree nisi has been pronounced, asked the intervention of The Queen's Proctor, in order that the procedure might be tried again to show that the opposite side between the date of the decree nisi and the date of its being made absolute, had so conducted himself that he was not entitled to the benefit of the decree which he had obtained. The position of matters in this colony has been made clear by the words to which my learned brother has referred.

As to the guardianship of the children, it is perfectly clear that this court has not the option which judges in England have in determining the question. They come to it with a presumption in favor of the father, but that is modified by all the circumstances which have occurred in each case. But here we have a special law, the children are to be in custody of the person who has obtained the divorce; but I wish to couple with that, the remark that the Courts in France seem to have exer-

cised a very considerable amount of discretion in reference to the custody of the children. Certainly they have an uncontrolled right to determine the custody of the children, prior to the date of the decree, and pending the proceedings between the parties; but even after the decree is pronounced, they seem to have modified the law in a considerable degree.

Therefore I agree with my learned brother, in holding that we must entrust these children to the party who has obtained the divorce; but, at the same time, it will be open to the mother if any circumstances arise under which she thinks herself entitled to have that decree reconsidered or modified, to apply to the Court to that effect.

### SUPREME COURT

APPLICATION FOR A WRIT OF MANDAMUS TO COMPEL THE STIPENDIARY MAGISTRATE OF PORT-LOUIS TO RECEIVE AN APPEAL AGAINST A DECISION DISMISSING A CLAIM OF 90 RUPEES — WRIT DECLINED.

*This is an application for a writ of Mandamus to compel the Stipendiary Magistrate of Port Louis to receive the recognizance to allow the plaintiff to appeal from a Judgment delivered by the said Magistrate dismissing a claim of ninety rupees made by the Plaintiff against the Defendant.*

*Held that the right of appeal must be given by express enactment, and cannot be extended by an equitable construction to cases not distinctly enumerated.*

*That Ordinance 12 of 1878 Article 272 allows is an appeal only where a sum or penalty has been adjudged: and enacts that beyond the cases in which an appeal lies, the judgments of Stipendiary Magistrates shall be final and definitive.*

*The Court discharges the Rule with costs.*

CASENEUVE—Plaintiff

versus

SATTAR—Defendant

Before

His Honor A. MURE,—Second Puisne Judge

and

His Honor J. ROTILLARD,—Acting Puisne Judge



O. LAURENT,—Counsel for plaintiff  
E. LAURENT,—Attorney for the same

The Substitute Procureur General, counsel  
for respondent  
J. GUIBERT,—Attorney for the same

Record No. 22,201

11th December 1883.

A claim for ninety rupees having been made by the plaintiff against the defendant, before the Stipendiary Magistrate of Port Louis, judgment was given against the plaintiff, who being dissatisfied with the decision of the Magistrate, gave notice of appeal and offered to be bound in the usual way by recognizance to prosecute the appeal before the Supreme Court. The Magistrate however refused to receive the recognizance, and the application of the plaintiff is that the Court should issue a *mandamus* to compel the Magistrate to receive the recognizance of the plaintiff, and allow him to appeal from the judgment given in the Court below.

Art. 272 of Ordinance No. 12 of 1878, which governs the matter of appeals from judgments of Stipendiary Magistrates runs as follows :

“Any person who shall think himself aggrieved by any judgment or order of any Stipendiary Magistrate, may appeal from any such order or judgment, provided the sum or penalty adjudged to be paid shall be more than twenty rupees if awarded against an employer, or if awarded against a servant more than the amount of one month's wages,—otherwise such judgment or order shall be final and definitive to all intents and purposes.”

It was argued by the plaintiff's Counsel that although the terms of Article 272 seemed unfavourable to his client, in as much as they referred only to appeals to be made in cases where the defendant had been condemned either to imprisonment, or to pay a certain sum of money, yet, it was strange that no remedy should have been given to a plaintiff, who, through misinterpretation of the law by the Magistrate or otherwise, would have failed to obtain redress ; that this Court must hold the intention of the Legislator to have been to allow the remedy of an appeal in such cases to a plaintiff—supplementing by

its equitable jurisdiction, the restrictions apparently contained in Article 272 of Ordinance 12 of 1878.

It seems to the Court that the terms of Article 272 of Ordinance 12 of 1878, setting forth the cases in which an appeal from the judgment of a Stipendiary Magistrate can be made are clear and precise—Article 272 does not contemplate that appeals should be allowed in the cases where the plaintiff has failed in a claim for money or wages.

The Court cannot entertain the suggestion that it should exercise its equitable powers, by entertaining an appeal in the cases where, although the appeal is not allowed in express terms by a law, the Court may think that an appeal ought to lie.

It is a well recognised principle of our law, that the right of appeal must be given by express enactment and cannot be extended by an equitable construction to cases not distinctly enumerated. See *Lefevre vs Miller* 26, L. J. M. C. 175, and *Christie vs St Luke* 27, L. J. M. C. 153.

But apart from the general principle above referred to, the very wording of Article 272 of Ordinance 12 of 1878 can leave no doubt on the subject. After stating the cases in which an appeal is allowed, the article enacts that “otherwise such judgment or order shall be final and definitive to all intents and purposes.”

The Court in consequence discharges the rule given in the matter with costs.

## SUPREME COURT

CLAIM OF PAYMENT OF POLICY OF INSURANCE — DECLINED AS THE OCCUPIER OF PREMISES INSURED WAS GUILTY OF NEGLIGENCE.

*This is a claim for payment of a Policy of Insurance which was declined as the Court held that the plaintiff had been guilty of negligence, which under the circumstances, amounted to fraud as he might have stopped the fire in the beginning, he omitted to send for a fire engine, did nothing to save his good and shammed illness.*

Action dismissed with costs.

**SOCKALINGUM,—Plaintiff**

*versus*

**THE BRITISH FIRE INSURANCE  
COMPANY,—Defendant**

—  
Before

**His Honor ETIENNE PELLEREAU,—Acting  
Chief Judge**

And

**His Honor ANDREW MURE,—Second Puisne  
Judge**

—  
**W. NEWTON,—Counsel for Plaintiff  
E. SAUZIER,—Attorney for the same**

**H. GALÉA,—Counsel for Defendant  
ERNEST LEBLANC,—Attorney for the same**

—  
Record No. 21,783.

12th December 1883.

**JUDGMENT OF HIS HONOR MR JUSTICE MURE**

In this case, which is a claim by a person of the name of Sockalingum for the sum of Rs. 14,529.60 c. against the "British Fire Insurance Company" a very long proof has been laid before the Court, very numerous questions of law have been argued and it now falls to the Court to deliver judgment.

A Contract for fire insurance was entered into on the 6th of October 1882, it was a renewal of a previous Contract of insurance which had expired in the month of March previous, and it dated from the 6th of February 1882 to the 6th February 1883. The provisional receipts shew it to be a renewal of the previous policy.

In the first place the Court holds that the conditions of the policy now sued upon, being in exactly the same terms as the conditions of the policy previously in force in favor of the plaintiff, the plaintiff must be held to have been acquainted with the conditions of the policy. Now the Contract of Fire Insurance is a contract of indemnity. It is not a contract,

by which the party can be benefited in any respect, or can make a profit in any respect, but it is a contract of indemnity which is entered into as a contract of good faith on both sides. The Court of Cassation in dealing with the Law of Fire Insurance, have placed it apparently upon two sections of the Civil Code, 1134 and 1135, and we agree with much of the Law which was cited to us by the Counsel for the plaintiff.

The question here is first of all, what are the facts upon which the Court has to decide.

It appears that the plaintiff's agent Narainsamy on the afternoon of the 26th of October 1882 proceeded to Terre Rouge on some religious festival connected with the Hindoo religion, to which he belongs. He and all his men went there, and returned to the house towards night. He says at about 2 o'clock in the morning he was awakened by smoke, that he told his servant to go downstairs to see whether there was fire in the kitchen, and to come back to sleep; he found that the fire came from above, he ran down stairs, knocked his knee against something, became insensible, was carried first to a verandah on the opposite side of the street, and then to the house of Manicumpillay at some distance from the fire.

Now, we have to consider carefully whether this fire was a purely accidental one, or was one of a character which raises suspicion; and the result of our consideration has been very prejudicial to the views of the plaintiff. Narainsamy seems to me to make statements on his oath which cannot be believed.

In the first place in his declaration before the Magistrate, he alleged that when he awoke, the whole loft was in flames, and from that declaration one would conclude that all he had to do in order to save his life was to make his escape from the body of the premises. He does not say so, but certainly that is the deduction which one would make from the declaration. His account in the witness box here is a totally different matter, he says that when he awoke he perceived smoke in the room where he lay—he sent his cook, a man named Poynen, downstairs to see if there was fire in the yard, if not to come back to sleep. In this account of the matter, to go no further, there is a grave and serious contradiction, and one or other of these stories is untrue.

Again, he accounts for the origin of the fire

in a way which is not satisfactory. He suggests that it commenced on the roof of the house, having been communicated thereto by fire from Moottoo Comarun's house. Moottoo Comarun occupied premises immediately adjoining his own; Moottoo Comarun's shop was burnt down on that night, and the Insurance Company paid him the sum named in his policy of Insurance. But it is clearly proved that no dinner was cooked on that day in Moottoo Comarun's kitchen or in the plaintiff's kitchen, and that there was no fire in either of these kitchens after 4 o'clock on that day. Therefore, this suggestion as to where the fire came from, must be held not to be proved, but, rather to be disproved. Again it is perfectly clear from the evidence of all the witnesses, who were early on the spot, that the fire originated in the upper story or loft and made its way from there to the roof of the house, many witnesses concur in giving testimony which leads to that result, even after Constable Chambill had got access to the court-yard, after having knocked at the door three times in three quarters of an hour, there was no fire on the roof visible; but he says he saw through the open door of the house in the court yard, the upper room which looked simply as if it was well lighted. Therefore I hold that that statement of the plaintiff is again disproved.

Again the demeanour and the attitude of the plaintiff on this occasion become most suspicious. According to his account, in running down stairs he knocked his knee against something, and became insensible. This story is untrue. It is true that he was found next morning in bed by Inspector Kennelly and the secretary of the fire Insurance Company who went in search of him; both of them testify that they looked at his knee, and that there was no mark upon it which could effect a grown and strong man. But that he was insensible is also untrue, for it is proved that while the goods in the shop were being saved Narainsamy stood beside the constable who was watching the goods in the street, and made no effort whatever to save any of the goods. In the enquiry into the fire in the lower Court, which is produced in the process, it is said by one witness that towards the end of the fire he saved a case of candles, and that was the only thing he did. But it is clear from the evidence, not only of one constable but of several constables, that not one of the Indians belonging to the establishment gave a hand in the saving of the goods. There were no less than seven persons, including the plaintiff employed in the house, and not one of

these seven persons did anything towards saving the goods which were saved by the police. It is further testified by Chambill that Narainsamy remained for three quarters of an hour in the house while the fire was gathering strength, and after he had perceived that there was fire on his premises, without making any attempt to save the place. He sent no messenger to the fireman of the municipality, he did not inform the police, he remained quietly sitting by, seeing the flames and refusing to open the door to the policeman, until apparently the flames had gained such strength that the whole house must be burnt down. I can only interpret in that way the fact that Chambill knocked three times with his baton at the door of the Court yard at an interval of a quarter of an hour between each before he was admitted.

Again this man's duty first of all was to endeavour to save his books, so that his position should be known to his creditors and to the parties who were concerned. Those books it appears, were in a room up stairs. It may or may not have been possible to save these books, but the remarkable fact is that no attempt was made to save them. There were no less than seven Indians in the premises, they were all awake and alive to the existence of the fire during the period of time I have mentioned, and if we take the statement of Narainsamy to be true, that when he awoke smoke was seen, I think it is a fair deduction to say that at least an attempt should have been made to save the books. But his books were consumed by the flames. Again there were a great many empty tin petroleum cases found on the ground floor of the premises, the next morning by the police, and there is evidence by the police that they were not there when they were saving the goods, no tin cases of petroleum oil were in the shop when they saved the goods. Therefore these tin cases were above the shop, they were dangerously near the fire and why they were so is unexplained. We have no intimation why they were taken upstairs.

Again this man, Narainsamy was deeply in debt, he says he owed Rs 80,000 at the time and he has since become insolvent. On the other hand, it was said for him that the fact that the safe contained Rs 780 and certain jewels was a proof of his *bonafides*. My answer to that is this, that he probably comprehended that the safe was fire proof and that the property in it was perfectly certain to be saved.

Again it is said that the policy of insurance was not in existence at the date of the fire, and that if he had intended fraud he would have waited until after the policy of insurance had been issued, but it does not follow that he was not aware of the Contract which had been entered into between him and the company, and it is a remarkable fact that shortly after this Contract was renewed the fire took place. But the view which the Court feels bound to give effect to, and that which is sufficient for the determination of this case is, that there has been gross negligence which is equivalent to fraud. We are quite aware that simple acts of negligence are insured against by the Insurance Company, but from the facts which I have detailed we have come to be of opinion that in this case there has been negligence amounting to fraud.

That being so, the Court does not think it necessary to enter into any of the five questions of law which were discussed between the parties, or to determine the effect of certain conditions which appear in this policy of insurance, but holding that the fire is very suspicious in its character, and that the conduct of Narainsamy during the beginning of the fire was such as to amount to gross negligence and neglect of his duties, and such as put it out of his power to prove his own case, the Court is of opinion that the action must be dismissed.

*His Honor the Acting Chief Judge :*

I quite agree with what my learned brother has said. This Contract of insurance against fire is one of indemnity for goods destroyed by fire. If that destruction has taken place by the mere negligence of the insured, or his servant, it does not vitiate the Contract and prevent its having its effect, but all American, English and French decisions agree, and it has been ruled that if that negligence on the part of the insured amounts to fraud, he is not entitled to recover the amount of the indemnity. Applying that principle to the facts of this case, we think it is clearly shewn that there was such negligence on the part of Narainsamy—it is not shewn exactly how the fire began, it cannot be said that Narainsamy is guilty of having participated in setting the fire, but what is clearly shewn is this, that the destruction of the goods by the fire was owing to the negligence of Narainsamy, who might have stopped that fire in the beginning, who gave no notice to the fire engine people, and who did nothing to save the goods, he was shamming illness and

in fact, behaving in such a manner that the Court has come to the conclusion that he must have acted with a view to allowing the fire to destroy the goods.

We have come to the conclusion that the destruction was due mainly to that negligence, which under the circumstances amounted to fraud.

I therefore think with my learned brother, that the insured is not at all entitled to recover, and that the action should be dismissed, and it is hereby dismissed with costs.

### SUPREME COURT

CLAIM OF A DEBT BY PRINCIPAL ACTION.—  
VALIDATION OF ATTACHMENT. — REFERENCE BY JUDGE IN CHAMBERS TO SUPREME COURT.

*In this case a principal action was raised by the plaintiff against the defendant to enforce the payment of a sum of money claimed by him.*

*The plaintiff also lodged two oppositions in the hands of Mr M. Tourette, and the other on a sum in the Commercial Bank.*

*The validation of these attachments had been applied for in Chambers, but upon objections raised by the defendant, the Judge referred the matter as to the Commercial Bank to the Supreme Court for consideration together with the principal action.*

*In the principal action, Gentrac the husband urged that the debt was not due, as according to agreement it was to be paid by instalment.*

*The Court gave judgment accordingly.*

*The question of the attachment of the money in the Commercial Bank was not followed up by the plaintiff, as in the meantime the money attached in Tourette's hands proved sufficient to pay the debt.*

*The Court discharged the attachment.*

BONNIN—Plaintiff

*versus*

GENTRAC & wife—Defendants.

—

Before

His Honor A. MURE,—Second Puisne Judge

and

His Honor J. Rouillard,—Acting Puisne Judge.

—

H. GALÉA,—Counsel for plaintiff  
A. ROLANDO,—Attorney for the same.

V. DELAFAYE,—Counsel for Gentrac the husband one of the defendants.  
E. LEBLANC,—Attorney for the same.

T. LIONEL JENKINS,—Counsel for Gentrac the wife the other defendant.  
H. THATCHER,—Attorney for the same.

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Record No. 21,977

13th December 1884.

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### JUDGMENT

*Mr Justice Mure:*—This is a case in which a claim being due by Gentrac the wife to Bonnin for a certain sum, he raised a principal action in this Court against the wife, at the same time calling the husband.

These parties were married under the "régime" of separation of goods, but of course it was necessary that the husband should be made a party to the cause. In like manner Bonnin, the Creditor, raised two attachments in order that the debt due to him might be made good—one of these attachments was on a sum of money in the hands of an auctioneer in this town called Tourette, the other was on a sum of money in the Commercial Bank. That sum of money was in the name of Gentrac, the husband, and therefore to succeed in making good his claim against that sum of money, it was necessary for him to prove that though *prima facie* it did belong

to the husband, being in his name, yet that it was in truth the property of the wife. When the validity of the attachment came to be considered in Chambers, objections were taken, on the part of Gentrac the husband, and I believe on the part of Gentrac the wife also, with the result that an order of reference was pronounced by the Judge at Chambers directing the validity of the attachment to be considered along with the principal action. The principal action came on for hearing, and there being differences between the husband and the wife, the latter admitted the claim of Bonnin and admitted his right against the fund which had been attached. The husband on the other hand, took up the position that the debt was not due, it being payable by instalments and therefore that *the plaintiff* was not entitled to bring an action for the sum. There were other defences stated, among others, that this fund did not belong to Gentrac the wife. Upon the first head of this defence witnesses were called and heard, and the Court gave a judgment against Gentrac the wife and found Gentrac the husband liable in expenses.

Now we are told that these expenses were paid by Gentrac the husband, and that is not denied by Mr Jenkins for Gentrac the wife, but at any rate whether that sum of costs was paid or not, it does not seem to affect the question of the attachment in reference to which the order we have now to consider was made. The Court at a different time came to consider this question of the attachment, and a suit seems to have been about to commence between the parties, in which the right of property in the sum in the bank was to be determined; but it turned out that the property which Mr Marius Tourette had was being realised, and on being realised the sum which he had in his hands appeared to be sufficient to pay the debt of Bonnin the creditor, and, accordingly an order was pronounced, which, although it does not appear to be an order of consent, yet seems to be of this nature that it was suggested by the parties at the Bar. Part of the order is "that Mr Tourette "sworn auctioneer do pay to Bonnin out of "the funds in his hands belonging to Mrs "Gentrac the amount of Bonnin's claim in "principal interest and costs." But this order proceeds "that Gentrac the husband "do pay into the Registry a sum equal to "the costs incurred by Bonnin and by Mrs "Gentrac since the reference of this case "from Chambers, as to which sum the rights "of the parties are reserved. That after payment by Mr Tourette to Bonnin and after "deposit by Gentrac the husband as above

"ordered the attachment lodged on the 11th  
"May last with the Commercial Bank be  
"discharged."

This is certainly a very peculiar order, for it is to be observed that this is to be a sum deposited by Gentrac, the husband, and that he himself and Bonnin and Mrs Gentrac have all their rights upon it reserved. So that it is possible that as soon as he had made the deposit he would be entitled to say, "The circumstances are such that I am entitled to uplift that sum and neither Bonnin the creditor nor Mrs Gentrac has any right whatever to it." It is clear that Bonnin, whose whole debt has been paid in principal interest and costs, has no right whatever as against Gentrac for double payment of these costs; but probably at the time the Court gave the order there was danger that Gentrac as soon as the order of attachment was discharged, might take the money lying in his own name without paying any of the costs that were legally due by him, that is to say, he was liable to Bonnin in costs, and it was doubtful whether these costs would be paid by the sum in Mr Tourrette's hands; and therefore this addition to the order seems to have been made. It also seems possible that the Court considered that the eventual rights of his wife, if she had any, to that money in the Bank would be frustrated, and these appear to be the reasons why the order was made in the terms in which it is now couched. It is certainly made in very extraordinary terms, but it is an interlocutory judgment and it follows from it that if Gentrac the husband does that which he is directed to do in the preceding part of this part of the order which I am considering, a benefit is to accrue to him by the attachment being discharged, and so enabling him to uplift this money. But now we are told that other creditors lodged attachments about the same time with the Commercial Bank, and have attached this sum, that he has no desire to get any benefit whatever by this order, and in short we understand that there are attachments which at present prevent the payment of the sum in the Bank to Gentrac until further order; and that there is not now any danger of Gentrac receiving that sum of money until the property in it is determined, so that the restriction made by the Court in the order complained of is now of no avail.

The plaintiff in this action for the validity of the attachment does not appear, he ceases to prosecute the action, and very naturally, because it is stated that he has received the whole of his debt in principal interest and

costs. It follows, then, that the attachment of the money at his instance in the hands of the bank has no "raison d'être" at all, and that it must be discharged.

The Court holds, in the circumstances of this case, that the true course to follow will be to discharge this attachment, and that no costs shall be given in favor of either of the parties who appeared at the Bar.

## SUPREME COURT

CURATOR OF VACANT ESTATES SENT INTO POSSESSION OF AN ESTATE REPUTED VACANT, BUT OF WHICH AN HEIR WAS SUBSEQUENTLY SHOWN TO EXIST.—CURATOR MAINTAINED IN POSSESSION.

*In this case the Curator was sent into possession of a portion of land reputed to be vacant, which was claimed by the plaintiff. Among other things she pleaded that at the time the Curator was sent into possession, the Estate was not vacant as an heir to the Estate existed.*

*A delay of a year was given to the Plaintiff to adduce proof of her allegation, and on the case again coming before Court, she succeeded in establishing that an heir to the property was living at the time the Curator was sent into possession, and she urged that the Curator had been improperly sent into possession of the land.*

*Held that altho' the heir existed, it was not shewn that there was at the time the Curator was sent into possession a "known heir" according to Art. 811 of the Civil Code.*

*That it is not for the Curator when applying to be put in possession of an Estate reputed to be vacant, to shew that there are no heirs to the Estate in existence.*

CURATOR OF VACANT ESTATES,—  
Plaintiff.

versus

WIDOW LIONNET,—Defendant.

Before

His Honor Sir A. G. ELLIS, Kt. Chief Judge

and

His Honor ANDREW MURE,—Puisne Judge.

LOUIS ROUILLARD,—Counsel for Plaintiff.  
EUGÈNE LECLÉZIO,—Attorney for the same.

WILLIAM NEWTON,—Counsel for Defendant.  
FRÉDÉRIC ROBERT,—Attorney for the same.

Record No. 19,451

20th April 1888.

In this action an interlocutory judgment was pronounced by the Court on the 23rd June 1881 sisting proceedings for one year, in order to afford the Defendant an opportunity of adducing further evidence on a question of fact material to the disposal of a preliminary objection raised by the Defendant. It will be remembered that the Defendant pleaded that the Curator of the Vacant Estates has no title or capacity to bring the present action, in respect that the Estate of which he was sent into possession was not vacant. In support of this Plea the Defendant produced documentary evidence with the view of showing that an heir of Jean Baptiste Michel de Launay, in the person of a Mrs. Joly, existed at the date of the order of possession in the plaintiff's favour, and contended that the existence of this heir prevented the succession de Launay from being vacant; as the evidence adduced did not appear to us to be sufficient to establish the character of Mrs. Joly as heir, we granted the defendant a delay to adduce further evidence on this head, and pointed out that, even in the event of her being successful in satisfying us on this point, it was further necessary for her to show that Mrs. Joly was in the sense of Article 811 of the Civil Code, a "known heir" of Jean Baptiste Michel de Launay.

The delay having now expired the case again came before us, and it was admitted by the Plaintiff that the links wanting in the chain of evidence had been supplied, and that Mrs. Joly's character as a great grand niece of Jean Baptiste Michel de Launay, could not any longer be disputed by him.

Assuming therefore, for the purposes of this discussion, that, at the date of the order of the possession in favour of the Curator, there existed an heir of Jean Baptiste Michel de Launay in the person of Mrs Joly, we must now examine whether her existence took the succession out of the category of vacant successions; and rendered the order of 18th September, 1876, sending the Curator in possession of the succession of Jean Baptiste Michel de Launay, invalid and powerless to confer on the plaintiff the right to insist in this action.

By Article 811 of the Civil Code the circumstances under which a succession is "reputed" vacant, and in which a Curator may be appointed, are defined. It is in the first place noteworthy that the article does not speak of vacant successions, but of successions which are "reputed" to be vacant. It follows that a Curator may be appointed to a succession which in truth is not vacant, and that the state of matters contemplated by the article is that in which a presumption arises that a succession is vacant. It is not disputed that with one exception, the conditions mentioned which must concur in order to render the succession one which, in law, is reputed vacant, exist. The delays mentioned have expired—it is not pretended that any one came forward to claim the succession—but it is maintained by the Defendant that the existence of Mrs. Joly prevented the succession being vacant, as she must be regarded as an "héritier connu" a "known heir." What is meant by this expression as used in this article? The defendant maintains that having now, when her right was challenged by the Curator, succeeded in establishing the character of Mrs. Joly as an heir; she must be regarded as a "known heir" whose existence prevented the succession from being vacant, at first sight it certainly seems that such a construction is not one which gives its full meaning to the language of this Article. If the Defendants' contention be sustained it would seem to erase from the text of the word "connu" and to leave the clause as if it ran: "Lorsqu'il n'y a pas d'héritier" "when there is no heir." This is a very serious objection to the defendant's pretention, and further inquiry shows that her interpretation cannot be accepted as the sound construction to be given to the expression used here. It must be borne in mind, that the question before us is not whether Mrs Joly or other claiming in her right may not be entitled to claim this Estate, but whether the mere fact of her existence ren-

ders the order of possession held by the Plaintiff null and void, and debars him even from judicially demanding to be put in possession of this Estate. The point before us is a preliminary plea to the Plaintiff's action, and does not touch the merits of the suit. It may be that the defendant now stands in the rights of Mrs. Joly, and as representing her, can plead to the Plaintiffs' demand all that Mrs. Joly could have pleaded, that point will arise on the merits, but what we have now to determine is whether the existence of an heir irrespective of any right on the part of the Defendant to invoke her rights, is a bar to this suit.

Bearing this in mind, if we examine the consequence of the Defendant's construction of this article, we shall find that these confirm the impression that the meaning which she seeks to give to the term "héritier connu" cannot be countenanced. If the mere existence of an heir prevents a succession from being reputed vacant, then the Curator can only be sent into possession of a succession when he can establish that as a matter of fact, no heir exists, a burden of proofs which in most cases would be utterly impossible. But such a conclusion would lead to this anomalous result, that while one of the great objects sought to be attained by the putting the Curator in possession, is the safe guarding of the rights of possible but unknown heirs, and the providing of a representative of the succession, against whom claims could be enforced, his appointment according to the argument of the Defendant could only be validly made when there were found to be no heirs existing whose rights he could protect, and creditors of the succession would be prevented from obtaining the appointment of a Curator against whom they could exercise their rights, except in the most rare and exceptional circumstances. Further, the very policy of the Law, shows that this construction is inadmissible, for our law contemplates that when an heir ultimately presents himself, he may apply for an order requiring the Curator to divest himself in his favour; while, if the mere existence of an heir struck at the foundation of the Curator's title, and rendered the order in his favour null and void, an heir on presenting himself might challenge the whole intromissions of the Curator, and demand that the order should be set aside, as bad and *ab initio*.

These considerations confirm our opinion that the construction contended for here by the Defendant, which (as we have already

seen) fails to give to the words in this article their full and proper effect—cannot be adopted as the sound reading of the article.

But, if the existence *per se* of an heir does not present a bar to the succession being in the language of the article "reputed vacant," can Mrs. Joly be held to have been at the date of the order of possession a "known heir?" In interpreting the term "connu," we think that while on the one hand the fact of the existence of an heir being ignored by the Curator, is not sufficient to render a succession one which is legally reputed vacant, on the other, the mere fact that one or two individuals are aware of the existence of an heir, does not prevent the succession from being reputed vacant. The words "héritier connu" must be read as signifying generally known to those interested in the affairs of the succession. As we have seen, one great object of the appointment of a Curator to a vacant succession, is to enable those who have claims against it to exercise them. If a "known heir" exists against whom these rights can be enforced, one great object with which such appointments are made would disappear, now can we say that in this case, at the date of the order of possession, Mrs. Joly can be regarded as having been a "known heir." The burden of establishing this lies on the defendant, and we do not think that she has succeeded in satisfying it. Far from Mrs. Joly's character having been *generally known*, as we have seen, it is only after obtaining a long stay of proceedings that the Defendant has been able to establish her character as heir. It is true that a fact may be known, the proof of which is attended with great difficulty.

But apart from an affidavit made by Gabriel Hypolite Lionnet on the 4th November 1879, to the effect at that date he believes Mrs. Joly to be entitled to a share in the succession de Launay, we have no evidence which could entitle us to say that the Defendant has succeeded in proving that in September 1876, the date of the order of possession, Mrs. Joly was in the sense of article 811 a "known heir" of J. B. M. de Launay.

An examination of the best commentators fortifies us in the conclusion to which we have come, viz: that the mere existence of an heir, unless he be known to possess the character of heir, does not suffice to prevent the succession being reputed vacant, and the valid appointment of a Curator. Thus Laurent, whom the Defendant cited as an authority, observes (Vol. 103, 186.) "La vacance de l'hérité



"est une question de fait ; la loi ne peut pas  
"tenir compte d'un représentant qui est  
"ignoré, jusqu'à ce qu'il se présente pour  
"réclamer l'hérédité." (See also Demolombe  
Vol. 153, 410).

We are accordingly of opinion that the defendant has failed to satisfy the burden of proof incumbent on her, or to show that on 18th September 1876 there existed a "known

heir," (within the meaning of these words as used in Article 811 of the Civil Code) whose existence prevented the succession of Jean Baptiste Michel de Launay from being reputed vacant, and rendered invalid the order sending the Plaintiff into possession of his succession—and we must therefore repel the preliminary objection to the Curator's title to institute the present action.

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End of the year 1883.

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# JUDGMENTS OF THE SUPREME AND OTHER COURTS

OF

MAURITIUS

EDITED BY

ANATOLE SAUZIER, ADVOCATE

AND

NORTH HALL,

CHIEF CLERK, PROCUREUR GENERAL'S OFFICE

1884

## SUPREME COURT.

**APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE PLAINES WILHEMS.—POLLUTION OF RIVER.—CONVICTION QUASHED AS IT PROCEEDED UPON AN OFFENCE NOT CHARGED —ARTICLES 4 AND 5 OF ORDINANCE 15 OF 1883.**

*This is an appeal from a decision of the District Magistrate of Plaines Wilhems condemning the appellant to a fine of Rs. 500 for having polluted the water of a River contrary to article 4 of Ordinance 15 of 1883.*

*The information charged the appellant with the wilful pollution of the River, contrary to article 4, whereas the Magistrate convicted him of the contravention of article 5 of the Ordinance which provides a penalty for the pollution of Rivers by neglect or carelessness.*

*The Court held that the appellant had been convicted of an offence not charged and quashed the conviction.*

**ANGE RÉGNARD,—Appellant**

*versus*

**THE QUEEN,—Respondent.**

Before

**HIS HONOR EUGÈNE JULES LACLÉZIO,—Chief Judge**

and

**HIS HONOR ANDREW MURE,—Puisne Judge**

**PIERRE LÉONCE CHASTELLIER,—Counsel for Appellant**

**EDMOND DUVIVIER,—Attorney for the same**

JOHN M<sup>c</sup> DOUGALL GIBSON—Substitute Procureur and Advocate General—Counsel for Respondent

JULIUS GUIBERT, Crown Attorney,—Attorney for the same.

Record No. 501.

5th February 1884.

In this case the appellant was charged in the District Court of Plaines Wilhems with a contravention of the Ordinance number 15 of 1883, the information being laid against him in the following manner to wit : that he did wilfully and unlawfully cause to be placed in the Plaines Wilhems River on or about the 26th November 1883, certain waters coming from the Estate "Trianon" which said waters were impure and did on being placed in the said river tend to pollute the water of the said river. This information is clearly founded upon the fourth section of the above Ordinance No. 15 of 1883, which *inter alia* enacts that "any person who shall place or cause to be placed in any river or any channel issuing thereinto any substance whatever that may tend to pollute the water of such river shall be punished for a first offence by a fine of not less than Rs. 30 nor more than one thousand rupees". The same Ordinance contains another section which is in the following terms : "the penalty shall be only the half of those provided by the last paragraph but one of the preceding Article, if the offences therein referred to are committed ~~not wilfully~~, but through negligence, imprudence or carelessness".

There is no doubt that the appellant was charged in the information above quoted with the offence contained in the fourth section of this Ordinance which clearly refers to the case of a wilful and direct act of the party charged, and by which some substance is actually placed or caused to be placed in the river which tends to pollute the water of such river. It is characterised as done wilfully by the subsequent section of the Ordinance drawing a distinction between it and the offence spoken of by that subsequent section.

There is a direct act of volition implied in the offence contained in the fourth article, and the agent directly and intentionally does something which produces that act. Accordingly this information itself charges the appel-

lant with a wilful and unlawful act. But the offence contemplated by the fifth article is one which negligence or imprudence may produce without intention existing in the offence at all, it is some neglect or want of care which must be charged.

A system of bad management or want of attention to certain arrangements are pointed at by the fifth article and a direct act by the fourth. The Court is of opinion that two different and distinct offences are created by these two articles of the Ordinance, that the allegations made in an information founded on the one must be entirely different from a charge founded on the other. In the present case we have a charge laid on the fourth section ; if it were based upon the fifth, nothing wilful would be implied, but the act of negligence or imprudence, or carelessness should be set forth, which had tended to produce the pollution. It is clear also that the proof which the prosecutor would adduce in these two cases would be entirely different and it is equally clear a defendant who was charged with a wilful act would have a very different defence from one who was charged with an imprudent or negligent act.

The Magistrate heard the evidence of various witnesses from which it appeared *inter alia* that the appellant was not on the spot that day, till late in the afternoon, the alleged pollution having taken place early in the day.

The Magistrate in the conviction says : " I convict the said Ange Régard of the offence charged upon him as aforesaid and under Article 5 of Ordinance No. 15 of 1883 I do therefore adjudge the said Ange Régard ~~for his said offence to forfeit and pay the sum of Rs 500 as a fine &c.~~ While the Magistrate has convicted of the offence charged under the fourth section he has proceeded to punish under the fifth section of the Ordinance, he has thus punished the appellant for an offence with which he was not charged and has punished him as if he had been convicted of an act of negligence, imprudence or carelessness. We have here therefore an information for one offence and a conviction for a different offence and under a different section of the Ordinance and punishable in a different manner. In the case of Martin vs. Pridgeon 28 L. S. N. S. Mag. cases, page 179, the appellant had been summoned on a charge of being drunk and guilty of riotous behaviour, but the Justices convicted him of drunkenness merely. The conviction was quashed ; Lord Campbell, Chief Justice remarking : " the

"conviction is for a different offence and under a different act of Parliament" and Justice Crompton says: "the appellant was summoned for an offence punishable in one way and has been convicted of one punishable in another and different way; why was not a summons drawn up which would meet the offence which could be proved?"

It was argued by the Substitute Procureur General that the offence of the fifth section was the same as that contained in the fourth, but with a lesser degree of wrongfulness, and that the two sections of the Ordinance are to be interpreted on the principle that the greater included the less and that if there was a charge of the greater a conviction for the less offence was competent.

The Court for the reasons above stated cannot adopt that the view the two sections imply the same kind of offence with different degrees of heinousness and they are of opinion that it is the duty of the Magistrate to confine himself within the limits of the information before him and to make an adjudication in conformity therewith. In the case of *Kirkhan and ors. vs. Jenkins* L. J. V. 32 N. S. Mag. Cases page 140, the appellants were charged with being found at night in the dwelling house of the respondent for a certain unlawful purposes to wit: for the purpose of feloniously stealing and converting to their own use certain provisions of and belonging to the respondent. It was proved that the appellants were in the house of the respondent with his servant and the Justices found that they were there for the purpose of joining in the taking and consuming of the provisions which were the property of the respondent without his knowledge and consent and convicted them of the offence charged.

It was held that this conviction was bad as the Justices did not find that the appellants were in the house for a felonious purpose as charged in the information and Chief Justice Cockburn says: "I am of opinion that this conviction must be quashed on the ground that the Justices have stopped short of finding what is alleged in the information. They thus give the go by to what is the essence of the offence, and Justice Crompton says: "We do not say that they might not have found them guilty of the felony, but they shrank from coming to that conclusion. If they convicted of an offence short of felony the conviction is bad for they have not convicted of the offence laid in the information, if they had so

convicted the appellants, the judgment might have been good".

Applying the principle of the two decisions above quoted to the present case and holding that there are the two distinct and separate offences set forth in the articles 4 and 5 of the ordinance in question we are of opinion that the Magistrate was not entitled to find the offence set forth in the fourth section to be proved and yet sentence the appellant under the fifth section of the Ordinance.

We do not think it necessary to enter upon the other points which were argued before us except that we desire to say that the fourth and fifth sections of the Ordinance which we have been considering do not seem to be necessarily connected with the first three sections of the same Ordinance which impose certain duties on the managers of sugar estates and certain penalties for contravention of these duties on the Manager and owners thereof.

The fourth section of this Ordinance sets out by saying that Article 29 of Ordinance 35 of 1863 is repealed and replaced by the following provisions and then follow the provisions which have been noticed in this judgment.

It is clear that the fourth and fifth Articles of the recent Ordinance replaced Article 29 of Ordinance No. 35 of 1863 and that though duties are imposed by the earlier Articles of Ordinance No. 15 of 1883 upon managers yet Articles 4 and 5 do not appear to affect them more than any other person who may contravene their provisions.

In the present case and on the ground above stated the Court is of opinion that the conviction cannot be sustained and quashes it accordingly.

## SUPREME COURT.

CERTIORARI. — DECISION OF STIPENDIARY MAGISTRATE FLACQ, DISMISSING A COMPLAINT AGAINST A LABORER FOR REFUSING TO PERFORM LATRINE SERVICE, SET ASIDE — ART. 110 OF ORDINANCE 12 OF 1878.

*In this case a judgment of the Stipendiary Court of Flacq was removed into the Supreme Court by writ of certiorari. The judgment in question dismissed a complaint.*



*brought against an Indian Paranem for refusing to perform the latrine service on the Estate, on the plea that he had engaged to perform field work and not the latrine work he was called upon to do.*

*The Court held that the latrine service upon Estates was ordered by Regulations which have force of law and that the intention of the law was that the latrine service should be performed by the labourers of the Estate.*

*Decision of the Magistrate set aside.*

—  
PROCUREUR GENERAL,—Plaintiff

versus

THE STIPENDIARY MAGISTRATE  
FLACQ & ANOTHER,—Defendants

—  
Before

His Honor EUGÈNE J. LECLÉZIO,—Chief  
Judge.

and

His Honor ANDREW MURE,—Puisne Judge

—  
JOHN M<sup>c</sup> DOUGALL GIBSON,—Substitute Pro-  
cureur and Advocate General,—Counsel  
for plaintiff

JULIUS GUIBERT, Crown Attorney, and At-  
torney for the same

THE STIPENDIARY MAGISTRATE, one of the  
defendants, not appearing

RUNGASAMY PARANEM, the other defendant,  
appearing in person

—  
Record No. 22,219.

8th February 1884

This is a motion made by the Substitute Procureur General to obtain from the Court an order quashing a certain decision of the Stipendiary Magistrate of Flacq by which he dismissed a complaint entered before him by the owners of "Richfund" Estate against a labourer of that Estate, one Rungassamy Paranem, for refusal of work.

It appears from the record brought before us by a writ of "certiorari" that Paranem

was engaged by a written contract on "Richfund" as a general servant and labourer, that he had been previously employed on the Estate as the cartman of a cart used for scavenging purposes, and that one day being ordered to lift up the tubs of a latrine, he refused to do so. When Paranem appeared before the Magistrate he stated that he was sent to scavenger's work and that he was not engaged for that purpose.

When this case was called before us the Magistrate left default, but Paranem appeared in person and being asked by the Court what he had to say, he stated that his master wanted him to do latrine work which he refused to do, as he was not engaged to perform such work, but only field work.

Paranem was prosecuted under article 110 of Ordinance 12 of 1878 for having refused to obey a reasonable order of his employer, and the Magistrate, by dismissing the complaint, seems to have come to the conclusion that the order given to him to do latrine work was not reasonable. The Magistrate does not give the grounds of his judgment in the record, and as he did not appear before us to support it, we do not know what were the reasons which induced him to dismiss the case.

Paranem is engaged as a general servant and labourer and we think he is mistaken when he maintains that he is engaged to perform field work only. There are many other kinds of work on a sugar estate which a labourer is bound to perform besides field work.

Article 111 of Ordinance 12 of 1878 enacts that "no servant engaged for field labour shall be compelled to perform any work on Sunday or public holidays, save only such as shall be of immediate necessity for the care and feeding of animals, the cleanliness of yards, sties, stables, fields, manufactories and buildings, etc." This provision clearly shows that a field labourer may be employed to clean yards and buildings on the estate, and that no special engagement is required for the performance of that sort of work.

The regulations of the 3rd July 1879 on the Hospitals and those of the 3rd October of the same year on the Camps of Sugar Estates, provide for the cleansing of latrines in an efficient manner, and require the employer to cause that to be done daily, which implies that some of his labourers shall perform that

kind of work as part of their daily duty. These provisions were enacted in the interest of the men themselves engaged on estates and of their families. The scavenging is to be made by means of an estate cart; it is not said by whom the cleansing will be made, but we think that there can be no doubt, from the general scope of the Ordinance and of the regulations under it, that the legislator intended such work to be performed, not as extra work and by a separate staff of men to be kept for that purpose, but by the labourers themselves engaged on the estate. In the present case Paranem had been engaged for some time and apparently at his own request in driving a latrine cart, and the difference between that and lifting the tubs into the cart is so slight that it certainly seems to us unreasonable in such a servant to refuse to obey the order given him.

We must therefore set aside the judgment of the Magistrate dismissing the complaint against Paranem as contrary to the provisions of article 110 of Ordinance 12 of 1878 and we order that the case be proceeded with according to law.

#### SUPREME COURT

**CERTIORARI.—EMBEZZLEMENT.—OBJECTION RAISED THAT INFORMATION DISCLOSES NO CRIME AND RESERVED—HELD TO BE OF THE NATURE OF A DEMURRER AND SHOULD BE DECIDED PEREMPTORILY.—JUDGMENT QUASHED.**

*In this matter, an interlocutory judgment of the Junior District Magistrate was removed into the Supreme Court by a writ of certiorari under the following circumstances:*

*Two defendants, Jacques and Monk, were charged before the Junior District Magistrate with embezzlement. They urged that the information as worded did not disclose any crime.*

*The Magistrate reserved the point to be taken after the evidence.*

*The Magistrate appeared before the Supreme Court and argued that there was a doubt upon the face of the information whether the accused were accomplices or co-authors; that he held the information good enough to go to trial and that the evidence might solve the difficulties he met with.*

*The Court held that the objection taken was of the nature of a demurrer, that the procedure in criminal cases should be of a peremptory nature and that it is the duty of the Judge to decide the points raised then unless there is a special authority to reserve.*

*The interlocutory judgment is quashed and the case is remitted back to the Magistrate.*

—  
**THE HONORABLE THE PROCUREUR GENERAL,—Plaintiff**

—  
*versus*

**THE ACTING JUNIOR DISTRICT MAGISTRATE, PORT LOUIS,**

and

**JACQUES & MONK—Defendants.**

—  
Before

**His Honor ANDREW MURE—Puisne Judge**

and

**His Honor JOHN ROUILLARD—Acting Puisne Judge**

—  
**JOHN Mc DOUGALL GIBSON, Substitute Procureur General,—Counsel for Plaintiff**  
**JULIUS GUIBERT, Crown Attorney,—Attorney for the same**

**MILES BROWN—Counsel for Jacques**

**THE DISTRICT MAGISTRATE—Appearing in person**

**MONK, the other Defendant, leaving default.**

—  
Record No. 22296.

13th February 1884.

This is a writ of "Certiorari" bringing up for review an interlocutory judgment of the acting junior District Magistrate of Port Louis, pronounced on the 29th January of this year, reserving for future consideration

after inquiry into the case, a question raised by the respondent Jacques, one of the accused, to the effect that the information disclosed no crime against him. The facts are that the respondent Jacques and Monk were charged by the Honorable the Acting Procureur General before the said Magistrate with the crime of swindling under article 330 of the Penal Code of this Colony. The Court in disposing of the point now raised before them does not require to go into the merits of the information or express their opinion thereon. It is sufficient to state that before pleading to the indictment on the 29th January last, Mr. Barrister Brown for Jacques moved for the acquittal of his client inasmuch as the information did not disclose any crime. The record then bears these words: "Point reserved to be taken after evidence."

It is clear that the objection taken is of the nature of a demurrer. A demurrer both in criminal and in civil law amounts to this, that admitting the truth of all the facts alleged in the information or indictment, these are not sufficient in law to warrant the Court going on with the case, and the defendant or respondent is not bound to answer to the same, in short the information or indictment is not sufficient to entitle a Court of law to proceed therewith. Now when Jacques' Counsel moved for the acquittal of his client as the information disclosed no crime against him, the objection seems to be of the nature of a general demurrer. It went to the root of the whole matter, if no crime is disclosed, a prisoner should not stand in jeopardy of his life or his liberty for a single hour, and as soon as such an objection is taken the Court ought to decide whether there is a defect or not. The accused does not seem by the law of England to be bound to take the objection at any particular moment. In Scotland the Law is otherwise and by long practice enforced by express statute. The accused is bound to state any objection he may have to what is there called the relevancy of the indictment, and the Court, before the plea of the accused is taken, is bound to pronounce an interlocutor finding that the indictment is relevant or sufficient to incur the pains of law or otherwise as the case may be. In England the prisoner seems to have the option of taking a demurrer at the beginning of the proceedings and before plea given, or may reserve his objection until after verdict.

In conformity with this system, it is not unknown in the practise of this Court that an accused person often does not demur to the

indictment even when there is a substantial defect therein, but reserves his objection till after the verdict when, if convicted, he moves in arrest of judgment, and this has the double advantage of a chance of acquittal, and of the benefits of the plea of demurrer.— It is to be kept in mind however that in many instances, if the accused does not demur, the defect, if he pleads, will often be cured by the verdict.

While this appears to be the law of England, the question now submitted for the consideration of the Court is quite different. If a demurrer has been taken at the time of arraignment, it should be stated before the plea of not guilty. See *Rex vs. Banks & Smith* 620, and the Court has no hesitation in holding it to be correct practise, if an objection of this nature be taken which alleges that the information is so defective that the prisoner must be dismissed from the bar at once, that that objection should at once be disposed of. If it be fatal to the validity of the information it may be well asked why should the accused stand the chance of an unfavorable verdict in a case, in which, in law, he is entitled to be dismissed from the bar.

The magistrate argued that there was a doubt on the face of the information, whether Jacques was a co-author or merely an accomplice, and that the meaning of his judgment was that he had held the information good enough to go to trial, but that certain subsidiary points might come out in the evidence which would solve the question of co-author or accomplice. The Court cannot accept this explanation of the record which simply reserves for consideration after evidence of the point whether the accused was entitled to be dismissed inasmuch as the information disclosed no crime against him. The magistrate's explanation is the best proof that he was wrong in reserving the point raised before him because, if the wording of the information was ambiguous, as alleged by the Magistrate, to the extent that he could not determine whether the accused Jacques was an accomplice or co-author, then the information should have been at once quashed.

Various inconveniences would attend the procedure, which has been adopted by the Magistrate, which were pointed out in the argument of the Substitute Procureur General, amongst others, if the judgment of the Magistrate goes against the accused, it may be uncertain whether it was founded in law or in fact, so that an appeal might be rendered very difficult.

We are of opinion that the procedure in criminal law should be of a peremptory nature and that it is the duty of a judge to decide the points raised then and there unless there be a special authority to reserve. Therefore we cannot sustain the procedure which has been adopted in this case and we quash the interlocutory judgment complained of and remit to the Magistrate to proceed in terms of law.

### SUPREME COURT

**CLAIM OF Rs. 1253.90 BEING COSTS AWARDED BY SUPREME COURT. — DEFENDANT ON EVIDENCE, IN A FORMER CASE, STATED THAT HE WAS PARTNER IN A BAKERY. — NOW SAYS HE WAS MISTAKEN IN SAYING SO. — FRAUD MUST BE PROVED NOT PRESUMED. — CASE DISMISSED. — COSTS NOT ALLOWED TO DEFENDANT.**

*In this case plaintiff claims from defendant Rs. 1253.90 being the costs awarded by the Supreme Court in a case entered by plaintiff.*

*It is averred that the defendant is a partner in a bakery at Moka, and that he owns a carriage and horse. Stress is laid on the circumstance that, in the case in which the costs, which are the subject of the claim in this case, were awarded, defendant stated, on oath, that he was the owner of a third of the bakery referred to.*

*Defendant states, he believed, when he made this statement, that he really was a partner in the bakery which belongs to his brother. He had advanced money to carry on the concern and a verbal arrangement existed by which defendant was to be admitted as a partner. Since then his brother has made large advances of money to him and he (the brother) now says that these advances are more than equivalent to the sums defendant had given to him and he repudiates all claim of partnership. With regard to the horse and carriage, no proof is made.*

*The Court considers that suspicion should attach to the assertion of a man who, at one time, declares, on oath, that he is a partner in a bakery and, at another, that he was mistaken in his declaration. But as fraud has not been proved, the principle of law, under which it should not be presumed, has its application.*

*The summons is therefore dismissed; as the position of the defendant is not free from suspicion, he is not allowed costs.*

SAYED SAIB,—Plaintiff,

versus

DAUGUET,—Defendant.

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor JOHN ROUILLARD Acting Puisne Judge

PIERRE LÉONCE CHASTELLIER,—Counsel for Plaintiff

GUSTAVE ALBERT RITTER,—Attorney for the same

WILLIAM NEWTON,—Counsel for Defendant  
HENRY BERTIN,—Attorney for the same

Record No. 22,143

22nd February 1884

The defendant had caused the stock in trade of a shop at Moka to be provisionally seized, as belonging to Moosaheb and wife, who were his debtors for a sum of Rs 1040.

To these goods however Sayed Saib laid claim as having been transferred to him together with the good will of the shop a few months before and on the 16th August last, the Supreme Court gave judgment in favour of Sayed Saib with costs against the defendant Charles Dauguet.

These costs amounting to Rs 1253.90 have not yet been paid by Dauguet, who has been examined in Court under Ordinance No. 16 of 1869 touching his properties.

It is contended by plaintiff that the defendant has means sufficient to satisfy his debt for costs—amongst other properties it is asserted that the defendant is a partner together with his brother of a bakery at Moka that he is the owner of a horse and carriage, and great stress is laid upon the fact that

the defendant, who was examined on oath in the case which gave rise to these proceedings for non payment of costs, stated then that he was a man of means and that he owned a third in his brother's bakery, besides a certain sum of money.

The defendant, who was examined at great length, explained that at the time when he made under oath the statement that he owned one third in his brother's bakery he was *bond fide* under the impression that this was the case, but that, as a matter of fact, there never had been a deed of partnership between him and his brother, or any agreement in writing on the subject, but that, as a few years ago, he had handed over Rs 1000 to his brother and had helped in the management of the bakery there had been a kind of understanding between them that he would be admitted a partner. The defendant however added that now, his brother, who had advanced him large sums of money for the prosecution of his law suit against Syed Saib, maintained that the money so paid by him was more than the equivalent of defendant's share in the partnership, refusing any longer to acknowledge him as having a share in the concern and denied that he ever had any share in the Bakery concern.

This statement is corroborated by the defendant's brother who was also called as a witness and who denies that he ever made any other agreement with the latter than this : that he gave him a verbal promise of partnership at some future date if he worked well.

This evidence is not such as the Court would implicitly believe—and a certain degree of suspicion will naturally attach to the declaration of a man who at one time asserts that he is a partner in a concern and subsequently states that his claim to the partnership has been repudiated. But the Court observes that beyond a general suspicion that matters may be otherwise than as stated by the defendant and his brother there is no evidence to disprove the facts alleged. The Court has for instance no proof before it that the defendant ever acted as partner, that he subscribed any promissory notes, or accepted any accounts for the firm, that any division of profits was ever made between the alleged partners.

It may, after all, be true, that there was between the parties nothing more than a promise that a younger brother after working for a certain number of years in a commercial

enterprise, should be admitted into partnership, that the fact was believed by the defendant as accomplished, and that, on his brother refusing to carry out his promise, the defendant finds himself unable to enforce it.

There is no proof before the Court that the horse and carriage referred to in the proceedings belong to the defendant, as for the fact that rather large sums were expended by the defendant with reference to this law suit with plaintiff, it would not of itself constitute a case of fraud against the defendant. He was then free to choose his counsel and attorney and to fee them liberally. With the exception of an item paid with reference to a claim for damages pending between the same parties, all the expenditure in question was made previous to the claim of the plaintiff coming into existence, and for this in accordance with the judgment in the case of Pavy and another v. Ramsamy the defendant cannot be brought to account.

There is a general principle of law which we think finds its application here. Fraud is not to be presumed and as the facts alleged by the plaintiff in support of the alleged fraud have not been proved with certainty it is impossible to come to the conclusion that the plaintiff has proved his case.

In absence of any positive evidence of fraud on the part of the defendant, the Court will dismiss this summons, but as the defendant has by his own oath in the first case led the plaintiff into this case and the defendant's position is not without suspicion we do not give him costs.

### SUPREME COURT.

WRIT OF INJUNCTION. — OBJECTION; THAT WRIT CAN ONLY BE APPLIED FOR WHEN THE WRITTEN LAW OFFERS NO REMEDY, OVERRULED. — WRIT MAY BE ISSUED BEFORE ACTION IS ENTERED.

*This is an application for a writ of injunction to prevent the defendant from diverting from the canal from which the plaintiffs are entitled to a share of water, a certain stream known as Mongouit.*

*To the issue of this writ, two objections were raised :*

10. *That by Art. 3 of the Charter of Justice,*

*the powers of the Supreme Court as a Court of equity can only be exercised when the written law of Mauritius offers no remedy and that such is not the case in the present instance where redress can be obtained by an action at law.*

*Objection rejected.*

*20. That a writ of injunction could not be issued until after the action had been entered.*

*The Court granted the writ on the condition that within 14 days from the date of this judgment the plaintiffs do institute the necessary proceedings at law to raise the question at issue between the parties relative to the waters of the Mongoût stream.*

*Costs reserved.*

THE "BEAU PLAN" SUGAR ESTATES  
COMPANY,—Plaintiffs

*versus*

THE "PAMPLEMOUSSES" SUGAR  
ESTATES COMPANY,—Defendants

Before

HIS HONOR EUGÈNE JULES LECLÉZIO—Chief  
Judge

and

HIS HONOR JOHN ROUILLARD—Acting Puisne  
Judge.

WILLIAM NEWTON,—Counsel for Plaintiffs  
EMILE SAUZIER,—Attorney for the same

PIERRE, LÉONCE CHASTELLIER,—Counsel for  
Defendants

ANTONY JULES COLIN—Attorney for the same

Record No. 22,278

29th February 1884

This is an application for a writ of injunction made under the following circumstances:

The plaintiffs are borderers of the Ville Bague and Powder Mill Canals, and their rights to a portion of the waters of the said canals have been determined by a judgment of the Land Court given on the twenty sixth November 1869.

They allege that the canal, to the waters of which they have a share, is formed 10. by the waters of a tributary of the Rivière du Rempart, which was, at one time, in the course of last century, diverted into the Rivière des Pamplemousses and 20. by the waters of the Rivière des Pamplemousses itself. The plaintiffs assert that amongst the tributaries of the Rivière des Pamplemousses is a stream, which taking its source beyond the boundaries of "Mongoût" Estate, crosses that estate, and, after running through some marshes situate in "Espérance" Estate, falls into the Rivière des Pamplemousses, at a point little above a dam known under the name of Digue Reilly where the whole of the river is diverted into the Powder Mills canal, less a portion which, by another canal, is taken to the Botanical Gardens. The plaintiffs complain that, since the month of November last certain works, such as a canal in masonry, and iron pipes, have been erected for the purpose of diverting a considerable portion of the Mongoût stream into the "Clémentine" Estate, belonging to the defendants, where that water is used for irrigation and not returned to the river causing thereby great damage to the plaintiffs.

The injunction prayed for has for its object to prevent the defendants from diverting the waters of the Mongoût stream in the manner above set forth. To the form of the present proceedings several objections were raised; which must be disposed of before the merits of the case are considered. It was urged in the first place that, in terms of article 8 of the Charter of Justice, the powers of this Court as a Court of equity can only be exercised when the written law of Mauritius offers no remedy, and that such is not the case in the present instance, where redress can be obtained by an action at law. The opinion of the Court is that if there ever could be an occasion for exercising its equitable powers, it would be in cases like the present one, where certain acts are alleged to be committed, from the continuation of which serious damage would follow, and which the ordinary legal means could not stop until after protracted litigation, whilst by a writ of injunction, the alleged wrongful acts would be stopped for a time, until the respective rights of parties are settled by judgment. The Court will therefore reject defendants' objection. It was also pleaded that, by the established practice of the Courts of equity, writs of injunction could not be issued, until after the filing of a bill which, in this Court, would be equivalent to saying after

action brought. On referring to the law on the subject, we find that, although, as a general rule, injunctions are only granted upon a bill or information praying at the same time for that relief, this is not an absolute rule, and the Courts of equity claim in such matters, a discretionary power, which they use according to the circumstances in the case in which redress is sought, and there is on record a decision of this Court, (*Rouge v. Arlanda*—1876), in which a writ of injunction was granted before action brought.

The Court has now to consider if the plaintiffs have established such a strong *prima facie* case as will call for the interference of the Court between them and the defendants, and justify the granting of the relief prayed for, if not, for ever, by way of perpetual injunction, at all events, for such time as will enable the plaintiffs to establish their claim by the regular process of law. That the plaintiffs are entitled to a share of the Powder Mills canal is not denied by the defendants, but they contend, in the first place that, although the waters of the Ville Bague canal have been, for the sake of convenience, made to run into the Rivière des Pamplemousses during a portion of its course, yet, the canal and the river are distinct and that the plaintiffs have only a right to the waters of the canal. This is denied by the plaintiffs in their affidavits, and their statement receives a strong corroboration from the report of Duncan, made in 1868, which fully describes the sources of supply of the Powder Mills canal; we find in that report that, at a certain point, the whole of the waters of the Rivière des Pamplemousses was diverted into a canal taking water to the Botanical Gardens, and into the canal of which the plaintiffs are the borderers. On this point therefore there is a strong *prima facie* case for the plaintiffs. But we are not disposed to hold, as at present informed, that the owners of Mongoût are, as it was argued for the plaintiffs, bound by the judgment of the Land Court of 1869 to that extent that they have, by the effect of that judgment, lost all rights whatsoever to the enjoyment of the Mongoût stream. The question resolves itself into this: Have the defendants, who are in the rights of the owners of "Mongoût" Estate, established, at least *prima facie*, their rights absolutely to dispose of the whole or part of the waters of the stream?

A careful perusal of the affidavits produced by the defendants has satisfied us so far as any affidavits can be considered as supplying

absolute proof, that the stream which crosses the "Mongoût" Estate has several springs, some of which are situate in the estate and some beyond it, that the owners of "Mongoût" have always diverted the waters of the said stream for household purposes and for supplying water to their grounds. But none of these affidavits has shown that these waters were ever diverted so as not to return to the stream. Alfred Estelle, a mason, who swears that the waters of the stream were at all times diverted into a canal, relates that after passing behind the kitchen of the estate the canal took the waters so diverted into the ponds of the estate, but he is silent as to what became of the water after leaving the ponds, and the Court thinks it very probable that as sworn to in the affidavits produced by the plaintiffs, on leaving the ponds the water returned to the stream.

According to Mr Descubes and Messrs Martin and Le Merle, the waters of the stream, after reaching "Espérance" Estate, are so diminished by filtration and other causes as to be entirely lost, or, so little water remains, that it cannot be taken into account as a source of supply of the Pamplemousses River. But their observations are confined to the state of the stream, after the diversion complained of by the defendants. Although the quantity so diverted has not been measured, it must be important as it is used for irrigation purposes, and the natural presumption from the plans in evidence is, that if there had been no such diversion, the results described by these gentlemen would have been different.

The Court therefore holds that the plaintiffs have established a *prima facie* right to the waters of the stream running through "Mongoût", as one of the tributaries of the river from which the waters of the Powder Mills canal are derived. That the defendants have so far failed to establish any right to dispose of the waters of the aforesaid stream, otherwise than for household purposes and for supplying with waters some ponds which exist on the "Mongoût" Estate. The Court will accordingly grant the writ of injunction prayed for, but only to the extent of restraining the defendants to use the canals and pipes lately erected by them to convey a portion of the waters of the stream to "Clémentine" Estate.

The injunction is granted on condition that within fourteen days from the date of this judgment the plaintiffs do institute the neces-

sary proceedings at law to raise the question at issue between the parties relative to the disposal of the waters of the Mongout stream, failing the fulfilments of this condition, the present injunction will be rescinded.

Costs reserved.

### SUPREME COURT.

**DECREE OF THE COURT QUASHING A JUDGMENT OF THE BENCH OF MAGISTRATES, PORT LOUIS, IN A CASE OF LARCENY.—ARTICLE REMOVED, BUT NOT CARRIED AWAY—ARTICLES 301, 309 PENAL CODE.**

*This is a motion made upon a writ of certiorari asking for a decree of the Court to quash a judgment of the Bench of Magistrates of Port Louis by which a charge against Ramsamy and Anasamy, accusing them with having stolen a box of jewellery, was dismissed.*

*The Procureur General urged that the judgment was in breach of articles 301 and 309 of the Penal Code; as the evidence showed that the box had been removed by the accused from the place, i.e. the room, where it had been placed by its owner, to a position nearer the door of the same room.*

*Held that the least removal of an article from its natural and proper place of keeping and where the owner has placed it for security is sufficient to constitute larceny.*

*It therefore quashes the judgment and refers back the record in order that the case may be proceeded with according to law.*

**PROCURER GENERAL,—Plaintiff**

*versus*

**THE BENCH OF MAGISTRATES PORT LOUIS & OTHERS,—Defendants**

—  
Before

**HIS HONOR EUGÈNE JULES LECLÉZIO,—Chief Judge**

and

**HIS HONOR ANDREW MURE,—Puisne Judge**

**JOHN M<sup>c</sup> DOUGALL GIBSON, Substitute Procureur General,—Counsel for Plaintiff**  
**JULIUS GUIBERT,—Attorney for the same**

**WILLIAM NEWTON,—Counsel for Defendants**

Record No. 22,318

19th March 1884

This is a motion made at the request of the Procureur General upon a writ of "certiorari" in order to obtain a decree of the Court quashing a judgment given by the Bench of Magistrates of Port Louis, on the thirty first January last, by which they dismissed a charge brought against one Ramsamy and one Anasamy whereby they were accused with having by night and by means of scaling stolen a box containing jewellery

The learned Substitute Procureur General argued that the judgment of the Magistrates was in breach of article 301 and 309 of our Penal Code because they had decided wrongly that, although the evidence adduced before them showed that the box had been removed from the place where it had been put by the owners before they went to bed, to another place in the same room nearer the door, this removal or asportation was not sufficient to constitute the crime of larceny and that it was merely an attempt at larceny. He quoted many authorities, English and French in support of his theory that a removal of the nature of the one described in the evidence was sufficient to constitute a complete larceny in law.

For the defendants it was argued that the English authorities went much farther than the French and that the latter alone should be considered by the Court, as our law on larceny is copied *verbatim* from the French law, which differs in many respects from the English law on the matter; and besides that the Magistrates do not appear to have decided in law, but rather in fact that the removal spoken to by certain witnesses was sufficient to lead them to a conviction.

We have carefully examined the record sent to us and, although the decision of the Magistrates might have been more clearly worded, we think that there can be no doubt from the whole context of the judgment, especially when it is read in connection with the argument of the counsel who appeared



The Court holds that the petitioner is not entitled to raise now indirectly an issue as to the paternity of the child, whose status cannot be questioned at present, and they suggest that the phraseology should be altered and the allegations in question should be amended to the following effect :—" That your petitioner's wife gave birth to a child in September last which petitioner has never by his acts admitted to be his own." On the petition being so amended, proof will be allowed but it will not if the petition remains as it is.

### SUPREME COURT.

**APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE PORT LOUIS. CLAIM OF PROMISSORY NOTE.—PLEA THAT SIGNER WAS A TRADER AND FIVE YEARS HAD ELAPSED SINCE THE DATE OF HIS NOTE—THERE WAS PRESCRIPTION.—MAGISTRATE HELD THAT APPELLANT HAS NOT PROVED HE WAS A TRADER.—IN APPEAL MAGISTRATE'S JUDGMENT QUASHED.**

*This is an appeal from a judgment of the District Magistrate of Port Louis under the following circumstances :*

*The appellant was sued upon a promissory note for Rs. 750 and stated that at the time he subscribed the note, i. e. in 1865, he was a trader and pleaded 5 years prescription.*

*The Magistrate held that the defendant had not sufficiently established that he was a trader. From this judgment, the appellant appeals on the ground that it is contrary to evidence.*

*The Court, quashed the Magistrate's judgment, with costs against the respondent.*

**ELOI—Appellant**

*versus*

**ZAMUDIO—Respondent**

**Before His Honor EUGÈNE JULES LEOLÉZIO,  
Chief Judge**

**and**

**His Honor JOHN ROUILLARD, Acting Puisne  
Judge**

**VICTOR K/VERN,—Counsel for appellant  
ERNEST LEBLANC,—Attorney for the same**

**YVES JOLLIVET,—Counsel for respondent  
EMILE SAUZIER,—Attorney for the same**

**Record No. 797**

**20th March 1884.**

The appellant was sued before the District Court of Port Louis on a promissory note for Rs. 750. He there pleaded that at the time of subscribing the promissory note namely on the twenty third September one thousand eight hundred and sixty five, he was a trader, thereby invoking the five years prescription under article 189 of the Code of Commerce.

Evidence was led on both sides and the learned Magistrate held that the appellant who was the defendant in the District Court had not sufficiently established the fact of his having been a trader. From that judgment the present appeal was made, on the ground that it was contrary to evidence.

The facts which the appellant sought to establish before Magistrate were that in the year one thousand eight hundred and sixty five, besides owning a shop in Nicolay road under the name of one Teycheney he was a lime burner and consequently a trader. In support of this allegation there is the direct and positive evidence of the appellant, that of serjeant major Crighton once a clerk of Teycheney's and of Rivet who states that he bought lime from the appellant in one thousand eight hundred and sixty five, whilst Mr Attorney Sicard and Mr Capiron a dealer in lime, although they are unable to swear that in the particular year 1865 appellant was making lime, state that they have known him as a lime burner for a period extending further back than the year referred to. But there is more. Evidence was produced that on the first April one thousand eight hundred and sixty five a person named Jules Eloi took out a license as lime burner and the identity of this person with the appellant was hardly disputed.

To rebut that evidence two witnesses were produced before the Magistrate by the respondent, one of them, Perille, cannot swear that appellant was not a lime burner in one thousand eight hundred and sixty five but

states, to quote his own words, that appellant did not then "look like a lime burner" the other witness Mootoosamy refers in his evidence only to the year one thousand eight hundred and sixty seven when fever broke out in Mauritius, but cannot even say whether or not Eloi made lime at that time near the Manure Establishment where the witness was employed. Under these circumstances, although the Court feels a great disinclination to disturb the finding of a Magistrate on a question of evidence, it cannot share the opinion expressed by the learned Magistrate, that the evidence led by the defendant in the Court below is vague, especially when, in corroboration of the positive evidence produced by his witnesses, to the effect that he was a lime burner in the year one thousand eight hundred and sixty five, there is proof of the fact that, at the above date he had taken out a license which is to say the least a strong presumption that he intended carrying on his trade.

To this evidence the respondent opposes only that of two witnesses, who speaking only of their impressions, do not even go so far as to contradict the facts spoken to by the witnesses for the appellant.

The Court therefore reverses the judgment of the Magistrate in so far as it decides that the appellant was not a trader in 1865 and remits the case to the District Court that it should follow its course according to law.

Costs of the appeal against the respondent.

## SUPREME COURT

### SEQUESTRATION OF "BONNE MÈRE" ESTATE.

*Application for the sequestration of Bonne Mère and Queen Victoria Estates which is granted by the Court, it also sanctions the supply of guano to the Estate, the allowance of Rs 1,000 a month for management which is to include the salary of an under manager. It disallows Rs 6,000 for firewood, reduces from Rs 10,000 to Rs 6,000 the item for unexpected expenses and appoints Mr Jules Régnard sequestrator.*

DESVEAUX DE MARIGNY & ORS,—  
Plaintiffs

versus

MONTOCCHIO & ORS,—Defendants

Before

His Honor ANDREW MURR, Puisne Judge

and

His Honor JOHN BOUILLARD, Acting Puisne Judge

PIERRE LÉONCE CHASTELLIER,—Counsel for Plaintiffs

HENRY LECLÉZIO,—Attorney for the same

GEORGE GUIBERT,—Counsel for Clément Ulcoq

EUGÈNE LECLÉZIO,—Attorney for the same

JOHN Mc DOUGALL GIBSON,—Counsel for Curator of Vacant Estates

JULIUS GUIBERT,—Attorney for the same

WILLIAM NEWTON,—Counsel for Emile Michel

EVENOR GANACHAUD—Attorney for the same

HENRI GALÉA,—Counsel for Frédéric Montocchio

FRÉDÉRIC ROBERT,—Attorney for the same

Record No. 22,358

26th March 1884.

The Court after hearing parties and reading the conclusions of the "Ministère Public" grants the order of sequestration prayed for in terms of the application with the following modifications:

1o. 26 T. 500 of sulfate of ammonia and 175 tons of guano being required for manuring according to Mr Desveaux's evidence, 450 acres of virgin canes, the sequestrator is authorized to supply only such quantities of sulphate of ammonia and of guano as will be required for manuring the canes actually planted until the 5th June at which date it

is expected that the sale of the Estate will take place.

The proportion above set forth (namely 26 T. 500 of sulfate of ammonia at Rs. 340 and 175 T. of gnano at Rs. 150 for 450 acres) being strictly observed.

20. The allowance of Rs. 1000 a month for the management is maintained it being understood that this sum includes the salary of an under manager.

30. The Court disallows the sum of Rs 6000 for firewood.

40. The Court also reduces to Rs. 6000 the item of Rs. 10,000 for unexpected expenses.

The Court appoints Mr Jules Régnard as sequestrator and directs he shall receive 8 o/o interest and 1 o/o commission.

Costs to be costs of Sequestration.

### SUPREME COURT.

**ACTION FOR RECOVERY OF A SUM STATED TO HAVE BEEN PAID FROM PRIVATE FUNDS IN LIQUIDATION OF PARTNERSHIP DEBTS. — STRONGEST PROOF REQUIRED THAT THE AMOUNTS PAID WERE PARTNERSHIP DEBTS AND THE MONEY GIVEN IN PAYMENT, PRIVATE FUNDS. — PREMIUM ON POLICY OF LIFE INSURANCE GIVEN IN GUARANTEE OF PARTNERSHIP DEBTS, ALLOWED IN PART. — AS A SET OFF AGAINST THIS THERE IS A SUM ADMITTED TO HAVE BEEN DRAWN BY PLAINTIFF FROM PARTNERSHIP FUNDS. — CASE DISMISSED WITH COSTS.**

*This is an action for the recovery, from the heirs of the late Pérombelon, of a sum of Rs 6,647.47 c. The plaintiff and the deceased were partners and the amount claimed is said to be deceased's share of partnership debts which were paid by plaintiff out of his private funds.*

*The defendants urge that the plaintiff is first bound to give an account of his management of the partnership and of the liquidation.*

*The Court considers that this plea is of a preliminary nature and ought to be dis-*

*posed of before the merits of the case are gone into.*

*The proof in support of most of the debts for which claim is made by the defendants is very unsatisfactory. The books of the firm are not produced. The claim is made after the lapse of a number of years and after the death of his partner, who would, alone, have been in a position to dispute their correctness. The clearest proof of their validity is therefore requisite and verbal proof is not sufficient. The Court therefore disallows them.*

*One of the claims is for premium paid during 6 years on his policy of Insurance which was given by the defendant in guarantee of debts due by the firm.*

*As plaintiff profited personally by several bonuses and as he surrendered the policy to the Insurance Company, taking from the Company the surrender value of the policy, when it was reassigned to him, the Court does not consider that the partnership should pay the whole of the premiums and allows 25 o/o thereof.*

*This amounts to \$ 226.25 c. The plaintiff admits that he drew more salary from the partnership than Pérombelon and that the surplus, amounting to \$ 350, should be deducted from his claim. The Court gives effect to this admission and therefore dismisses the case with costs.*

*There is a process of attachment before the Court which is also dismissed.*

JEAN PIERRE,—Plaintiff

versus

ALBERT & ORS,—Defendant

Before

His Honor ANDREW MURK,—Puisne Judge

and

His Honor JOHN ROUILLARD Acting Puisne Judge

W. NEWTON—Counsel for Plaintiff  
N. SIGARD,—Attorney for the same.

P. L. CHASTELLIER, Counsel for Defendants

V. DUCASSE,—Attorney for the same.

Record No. 21,641.

27th March 1884.

In this case the Plaintiff has raised an action against the Defendant, the heirs under benefit of inventory of the late Alfred Pérombelon, to recover from them the sum of Rs. 6,647.47. It appears that the plaintiff Jean Pierre and the late Alfred Pérombelon, being both at the time clerks of Messrs. Ireland, Fraser & Co., entered into a deed of partnership, under private signatures, which partnership began on the 12th December 1866, was carried on in the name of Jean Pierre and was to endure for three years until the 12th December 1869.

The capital amounted to Rs. 8,082.04 c. half of which was supplied by each of the partners. It further appears and certainly is not denied by the defendants, that after the date of the expiry of the partnership, it continued to be carried on by both the partners, still in the name, as from the beginning, of Jean Pierre, the plaintiff; Pérombelon's position being such that he did not wish his name to appear or wish to be known as a partner of the firm. The business was carried on in two shops in Port-Louis, a Mr. Charles Martin being the first Manager until the middle of 1870. About that time an inventory was made by Alfred Pérombelon and one Jean Baptiste Pierre who had been employed as a clerk in one of the shops, which showed that certain losses, but of no great amount had been incurred. At that date Jean Baptiste Pierre became the manager of the business and one of the shops was shut up. About the middle of 1871, another inventory was made by Jean Baptiste Pierre, Pérombelon the son and Alfred Pérombelon one of the partners. So at least swear Jean Pierre the plaintiff and Jean Baptiste Pierre. This inventory, which is without title, and without signature of any of the partners is identified by the oath of the plaintiff and of the witness just named as applying to the business of Jean Pierre in which the plaintiff and the defendants' author were interested. It is unfortunate that the plaintiff did not himself exhibit his own signature and obtain that of his partner

to a docket authenticating this inventory and admitting its correctness. There are entered in it under the heading of "Débiteurs incertains" claims amounting to the large sum of more than Rs. 6,000. It is important here to notice that the parties by their actings and pleadings have recognized the two inventories abovementioned to apply to the partnership of Jean Pierre and to contain a *videmus* of the business of the Company at their respective dates. As from the inventory made in 1871, it appeared that losses were still continuing to be made, it was resolved to give up the business, and the shop, in which it was carried on, was shut up and Jean Baptiste Pierre was appointed liquidator and carried on the liquidation from September 1871 until March 1872. During this time he was realising the stock of the firm, and paying its debts. At the date last mentioned Jean Baptiste Pierre resigned the office of liquidator and handed over a balance of the stock which remained unsold to Jean Pierre the plaintiff. The latter admits in his evidence that all the creditors had been paid in full at that date except Ireland, Fraser & Co., Bartlett and Hugues. There were then in existence also five or six partnership books, about the disposal of which there is a conflict of evidence. Jean Pierre alleges that they were put into the hands of himself and his partner Pérombelon by Jean Baptiste Pierre, but the weight of evidence together with the probabilities of the case seems to point to these books having come into the hands of Jean Pierre solely. They are now non-existent or at least have not been produced in this process and as no settlement of affairs took place between the partners during the life time of Alfred Pérombelon the position of the plaintiff suing his representative is clearly one of difficulty. Pérombelon died on 23rd October 1881, no settlement having been made between the partners, no accounts having been closed as between them, and no admission by Pérombelon has been proved verbally or has been left in writing that his partner the plaintiff had made large payments on account of the firm, and that he was his debtor to the extent of one half of these payments. In cross examination the plaintiff admits that after all the claims against the partnership had been paid by him Pérombelon refused to accept his account, and to sign it in token of an admission that these debts had been paid not by partnership funds but from the plaintiff's own private monies. The very least that we can conclude from this is, that if Pérombelon were now alive, he would contest the present claim and would deny all liability.

Questions arose between the representatives of Pérombelon and the plaintiff, after the former's death, a bon signed by the latter having been found in the former's repositories and after some fruitless negotiations action was raised against the plaintiff for the amount of the bon. The plaintiff on the other hand raised the present declaration on the 28th July 1882 in which he seeks a judgment against the defendants for the said sum of Rs. 6,647.47 with interest and costs. The defendants while traversing and denying all the facts alleged in the plaintiff's declaration by their third plea object that the plaintiff is bound before bringing any action on account of the partnership claims alleged to have been paid by him to give a full and complete account of his management of the partnership and of the liquidation thereof. This plea is clearly of a preliminary nature and ought to have been disposed of before the merits of the action were gone into. This course however was not taken, and probably in the circumstances the defendants were well advised not to urge a plea which, in itself might have some legal weight, but which as applied to the general circumstances of the present case might not have been pleaded with success. Be that as it may on 10th November 1882 Mr. Newton being Counsel for the plaintiff and Mr. Guibert Counsel for the defendants, by consent of parties the Court ordered that the whole case be referred to the Master in order to compute accounts between the said parties and to report to the Court. That reference has been made, a long proof has been laid before the Master, and a report has been made by him to the Court. It is entirely upon the merits of the case and does not deal with the above plea substantively. It was, however, pleaded to the Court, when discussing the merits of the Report that the said plea was still valid and good, and in virtue thereof the declaration fell now to be dismissed. This was pleaded altogether irrespective of the merits of the action and to the effect above stated. The plea implies that before the defendants meet the plaintiff on the merits of the present claim, the latter is bound as a condition precedent to produce in process the whole accounts of the partnership, and of the liquidation. The Court cannot now give effect to this plea as contended for by the defendants. The consent to refer the whole case to the Master implies contestation between the parties in regard to the merits of the cause, and certainly if there was an intention to rely upon this plea, the defendants ought to have urged it at the earliest date before the Master. This was not done. The

Master's report deals with the case entirely on the merits and the Court holds that it is now too late to urge this preliminary point.

On the merits of the case there were several objections to the Master's report taken by the defendants. That officer has allowed a sum of \$ 656.43 which figures in the account as paid on 15th December 1871 to Mr. Fabre for money borrowed from him for the wants of the partnership in capital and interest. On this the Master simply says : "In support of this payment Jean Pierre produces a note signed by A. Fabre (document marked A)" and the inventory drawn up in 1870 in which at page 132 Fabre figures as a creditor of the partnership for \$ 600. I allow "this item".

There is in the first place, no proof that this sum is a partnership debt. The account founded upon simply begins without date with the words "ton billet \$ 328.37". Then various items of interests are added which make the above sum amount to... \$ 399.41 Credit is then given for "Compte de

Jean Pierre..... 220.23

\$ 179.18

Reçu à valoir ..... 88.50

Solde ..... \$ 90.63

15th December 1871.

A. R. S. H. FABRE.

It is difficult to see how this amount becomes the foundation for a claim of \$ 600 and interest as against the partnership. It is clear that the plaintiff considers that the account for which he gets credit for \$ 220.23 is a private claim of his own against Fabre and the presumption is, so far as proof from the account can be derived, that the principal sum said to be due to Fabre is also the private debt of the plaintiff; on no other supposition could compensation take place between the two debts, on the other hand if this account of Jean Pierre is a partnership account, what becomes of the greater part of this debt? It was clearly paid by a partnership account probably of goods procured from their shops. There is no other document of debt than this account. The promissory note has disappeared and it is difficult to see how this account forms a good document of debt against parties who do not admit it to be valid. The plaintiff may pay the money if he pleases knowing that he is due that sum, and without

any apparent legal liability on his part, but he cannot come against third parties saying : " because I have admitted a debt of which " there is no legal proof I have a right to " claim that sum from you ". Again the page of the book referred to by the Master seems to contain a statement of the stock in the respective shops held by the partners at the time, and there is brought over from the previous parts of the book, where there is a list of them, the total sum due by the various creditors of the two shops. There is then added *inter alia*.—Plus : A. Fabre (J. P.) \$ 600.

The Court considers that there is a presumption against this being a partnership debt arising out of the entry thus made. All the books of the partnership have apparently perished and there are no traces of this sum alleged to have been borrowed, of the date of the borrowing, of the purpose for which it was borrowed,—or how it was applied. Then in this page of the inventory occurs a total amount taken from two previous pages thereof filled with names of creditors of the partnership. These were of course obtained from the partnership books and among them it is evident Fabre's name was not borne. It is clear, then, that this item was subsequently added probably by the plaintiff's order though no trace of the debt was found in the partnership books. The same state of matter occurs in the subsequent inventory made in 1871. That document is sworn to have been made up from the books of the firm and a list of creditors is given and a clearly *ex post facto* entry is made " Billet de A. Fabre ".

Payé J. P. \$ 600.

But this item has been written after the amount due to the creditors had been summed up, and it is clearly added by an after thought and *ex post facto*. It must be concluded that not even at that date did Fabre's claim appear in the books of the firm. The plaintiff had been made aware by the earlier inventory of the fact that that claim was not contained in the books of the partnership, and it was certainly his duty, if it was a partnership debt, to have shown that to his co-partner, and have the amount regularly entered in the books of the Company. This however was not done and the Court is of opinion that there is no satisfactory proof that this was either a partnership debt or, if so, was paid by the private funds of the plaintiff. We disallow this item of the account. The plaintiff's account bears that he paid on 9th December 1871 an account of \$ 400 to Ireland,

Fraser & Co. \$ 357 ; the sole proof of this payment of \$ 357 by the plaintiff is the entry at page 164 of the book D containing the first inventory " payé à Ireland Fraser, 9 Décembre " pour faire le complément d'une somme " \$ 400—\$ 43 ".—Here there is an entry of the payment of \$ 43, but there is none of the payment of the \$ 357 and that the latter sum was paid at all is a mere deduction from the terms of this entry and depends entirely on the verbal testimony of the plaintiff and of Jean Baptiste Pierre, who is undoubtedly a friendly witness of the plaintiff. But we have this testimony given many years after the event, and it cannot be contradicted by the evidence of the only man who knew the facts of the case besides themselves. There is no entry in the inventory or in any partnership book of the payment of the \$ 357 and at the time of the alleged payment the business of the firm was going on, debts were being collected and creditors were being paid by the partnership funds. If at that period Jean Pierre paid partnership debts out of his own pocket, he ought to have preserved proof of the fact so as to conclude and bind his partner who was not engaged in the management of the partnership concerns and against whom therefore there must be clear proof in order to bind him and still more to bind his representatives after many years. But the presumption is that he had partnership funds in his hands at that moment as he was managing partner, and had complete control over the whole funds of the estate. The Court hold that in the absence of all entries in regard to this sum and considering the fact that the liquidation of the estate was then proceeding and that partnership funds were in existence, there is no proof which binds the heirs of a deceased partner that that sum was paid out of the private funds of the plaintiff.

We also disallow this item.

There are numerous payments made to Ireland Fraser & Co., " the sole proof of which is an excerpt from the books of the said company across which are written these words by an unknown writer " " true copy Ireland Fraser & Co. " and certain receipts bearing instalments of debts paid to Ireland Fraser & Co. by the plaintiff. No one has sworn to the correctness of the excerpt from Messrs Ireland Fraser & Co's books, nor even does Jean Pierre explain in his evidence the loss of the original accounts and the circumstances under which he obtained the duplicate accounts with the words written across

it. The receipts themselves merely bear the words : " Reçu de M. Jean Pierre la somme " de..... à valoir sur une plus forte " somme " and sometimes " à valoir " only. It is clear that this is not a very satisfactory proof of partnership debt, and when we turn to the inventory contained in the document E, which the plaintiff and his witness Jean Baptiste Pierre swear to contain a genuine statement of the partnership affairs, there are great discrepancies between the amounts therein stated to be due to Ireland Fraser & Co. and the sums in the accounts, which are certified by some person unknown to be true copies of those in their books. The important questions to be determined are whether the claim of Ireland Fraser & Co. was paid by partnership funds or not, and if there is sufficient proof that the claim was paid out of the plaintiff's private funds.

In considering a claim between a surviving partner, and the heirs of a deceased partner, it is clear that there must be conclusive proof against the defendants before we hold them proved. The claim is made more than eleven years after the partnership ceased to exist. The long lapse of time makes the burden of clear proof on the plaintiff still more onerous. When to this is added that the plaintiff took no action during the life time of his partner, but shortly after his death, served the present declaration on his representatives, we feel that verbal proof of the claim is a very unreliable basis on which to found a judgment in such a case.

It is clear that in a partnership claim as between parties the best legal proof would be a balance sheet drawn up by an accountant from the books of the firm regularly kept. But in the present case no books of the firm have been produced, and they do not now seem to be in existence. We further think that the parole testimony of the surviving partner and one friendly witness, given after the death of the only man who could have checked it and supplied information to test its correctness, can scarcely be received as evidence sufficient to prove his case, and indeed should be looked upon as a deposition against him and not in his favor. It could only be received in his favor if there were entries in books regularly kept, which his evidence explained and supplemented. But where regular books are entirely wanting, and where important facts such as that partnership funds at a certain date entirely failed, and when the plaintiff depones that his deceased partner consented to depart from large outstand-

ing claims against debtors to the company, it is impossible to receive these facts on such verbal testimony as we have in this case. No doubt the Court will consider and weigh such proof. But it is felt that the facts and circumstances of the case as revealed by the writings that are in process are far more important. Accordingly the Court has carefully considered the document E, which is an inventory and balance sheets drawn up at the termination of the business, and as sworn by Jean Baptiste Pierre after the second shop had been finally closed. That document in its six first pages names and sums up both the creditors and debtors of the firm, the latter being divided into " bons " and " incertains," and on the next page a balance sheet is drawn out from which it appears that the total amount due to the creditors of the firm was ..... \$ 6,982.94 and the total assets of the firm including only the good debtors, goods and money in bank amount to ..... 6,489 83

leaving a difference only of ..... \$ 493.11

But then this page of the inventory and balance sheet concludes with the important entry " débiteurs incertains et non comptés " \$ 3,057.63."

Now this inventory is put forward by the plaintiff and his witnesses as a genuine and correct statement of the partnership affairs. As there was only a balance of \$ 493 against the company and to meet that there was the large item of \$ 3,057 of doubtful debts of course we cannot take that the whole of these doubtful debtors proved entirely bad, but Baptiste Pierre tells us that from the date of the inventory he carried on the liquidation until March 1872 realising the stock, gathering in the debts due to the estate, and paying the creditors with the funds that came into his hands. That at that date he transferred to the plaintiff the remaining stock which he had not sold that he had then collected part of the doubtful debts, but there remained still \$ 2,000 to be collected from them, and the plaintiff in supplement of that evidence swears that with the consent of Pérombelon, his partner, he abandoned and gave up these \$ 2,000. But the Court is of opinion that there is no sufficient proof as against the defendant of this alleged consent of their author, and taking this inventory and balance on the footing it is presented to the Court, the presumption must be that a percentage of the doubtful debtors ac-

counts should have been recovered, sufficient to have paid the balance of \$ 493 brought out as against the firm; if 16 per cent of these doubtful debts were recovered, it would be sufficient to discharge the indebtedness of the firm. The Court cannot doubt but that the plaintiff might have collected, nay probably as he has no written record of these events, he has actually collected more than was necessary for that purpose. If he is in the position of a man who either has collected or ought to have collected sums sufficient to discharge all the claims against the partnership, it is evident that he has no claim which he can enforce against the heirs of his deceased partner. In the absence of all written proof that these claims were given up, in the absence of all record what amount of these doubtful claims were recovered, and deducting from the inventory E that the partnership estate was sufficient to cover all claims if properly dealt with, we hold that the plaintiff cannot recover against the defendant the various items which he alleges to be paid out of his funds to Ireland Fraser & Co., Hugues and Sauzier.

In the plaintiff's account there is a charge of \$ 1,065 for six years premium of a policy of insurance over his own life from 28th August 1871 to 28th August 1877 at \$ 170.50 per annum. There also appear in the account two items of \$ 33.72 and \$ 133.56 being interest on money borrowed by the plaintiff to pay a premium on the above policy of insurance. It appears that at a certain date the plaintiff assigned to Ireland Fraser & Co. a policy of Rs 10,000, which he had taken out on his own life. He did so at their request to guarantee the partnership debt due to them and he now claims one half of the whole premiums paid by him during the period the policy was held by Ireland Fraser & Co. from the defendants. This question is one of importance. If the plaintiff parted with his policy and gave the entire benefit thereof to the partnership his claim might be just, but this is not what was done. Let us suppose that the plaintiff had died during the currency of his assignation, Messrs Ireland Fraser & Co. would have been entitled to pay themselves the balance of their debt, which at no period was larger than about one half of the sum in the policy and which became smaller and smaller according as they received payment of the principal debt, they would in the case of the plaintiff's death have been entitled to the balance then due them and the plaintiff's heirs and representatives would

have taken by right the amount of the difference. Further it is in evidence that during the currency of the assignation Jean Pierre had several bonuses paid to him by the Insurance Company he discounted them himself and appropriated them, he says, towards the payment of the premiums. Finally after the policy was reassigned to him, he surrendered it to the Insurance Company taking from them its surrender value, which he has appropriated to himself. From the above facts, it is clear that this policy of insurance never became in any degree part of the partnership property, and that the premiums were paid for the benefit of the plaintiff himself. It is true that he assigned the claim to guarantee a partnership debt, and it seems equitable that the partnership should pay a percentage of the premiums paid during the period the guarantee subsisted.

The Court is of opinion that that percentage may fairly be estimated at 25 o/o of the premiums paid.

In place of the sum of \$ 1,065 which is now entered in the account the Court sustains that claim to the extent only of \$ 266.25. As for the two other items connected with this matter being for interest for money borrowed to pay premiums of insurance, the Court feels that this was a private matter of Jean Pierre alone. To sustain that claim would be to saddle the defendants with what in truth amounts to consequential damage. We think it too remote and indirect a ground of claim to say that in consequence of the plaintiff's straightened circumstances he was compelled to borrow money to pay a premium on his policy and to hold that the heirs of a deceased partner are bound to pay a share of that interest. Besides he borrowed that money for his own benefit, as we have above indicated.

There is thus a small sum of \$ 266.25 the half of which would fall to be paid by the defendants. But the above considerations do not finally settle matters between these litigants. The partners were allowed to take \$ 15 per month of salary and it appears this sum was not taken regularly, but that while Pérombelon took about \$ 600, the plaintiff has taken \$ 950 at different terms. He himself in his evidence says: "I therefore have taken about \$ 350 more than Pérombelon and that sum is to be deducted from my account." Giving effect to this admission, which is necessary that complete justice may be done between these litigants, the



defendants are entitled to have this action dismissed, which we now do with costs.

There is also a process of attachment before the Court, which must follow the fate of the principal action which we dissolve with costs.

### SUPREME COURT.

#### ACTION IN PAYMENT OF Rs. 1926.08—GUARANTEE — COMMERCIAL TRANSACTION — ORAL EVIDENCE—ADMISSIBILITY THEREOF

*The Plaintiffs, grain dealers in Port Louis, supplied one Fauque, a planter, with grain and other provisions to the amount of Rs. 1926.08, and this account not having been paid by Fauque, they now sue the defendant on the ground that having made an opening of Credit to Fauque on condition that the produce of this latter's estate should be consigned to him, he had guaranteed all the accounts due to the Plaintiffs by Fauque for goods supplied to his estate.*

*The plaintiffs alleged that a written guarantee had been given to them by defendant who had however caused the document to be returned to him in 1851. They therefore wished to prove by parole evidence the guarantee alleged to have been given to them by defendant.*

*This motion was resisted by defendant on the ground that though he was a trader and the contract entered into by him with Fauque was, on his side, of a commercial nature, yet in so far as Fauque a planter, was concerned, the Contract was Civil, and that consequently the obligation by which a Civil Contract was guaranteed could not but be Civil also.*

*Held that though a Contract of "Cautionnement" is of its nature generally gratuitous and cannot in consequence be ranked amongst "Actes de Commerce" whatever be the persons, traders or non traders, by whom the "Cautionnement" is given, yet cases may occur in which the "Cautionnement" is given for a consideration, and the transaction then becomes Commercial or Civil according to the nature of the consideration, and that the rule "Accessorium sequitur principale" cannot absolutely apply in such cases.*

*That the Court cannot allow oral evidence to be adduced to prove a transaction which, though commercial of its nature, was not of those which traders could be presumed or expected to conclude without reducing their agreement into writing.*

*That the circumstances of this case were such that "parole evidence" could not be adduced to prove the guarantee alleged to have been given by defendant to plaintiffs.*

#### COMTY & Co.,—Plaintiffs

*versus*

#### BRÉMON,—Defendant

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor JOHN ROUILLARD, Acting Puisne Judge

H. GALÉA,—Counsel for Plaintiffs

A. DESVEAUX,—Attorney for the same.

W. NEWTON,—Counsel for Defendant

P. F. LASTELLE,—Attorney for the same.

Record No. 22,108.

31st March 1884.

On the tenth July 1879 the defendant, a merchant in Port Louis, agreed to open to one Fauque a planter, a credit of Rs 5,000 in consideration of the consignment to the said Brémon of the produce of Fauque's estate, which consisted principally of aloe fibre; on the 2nd December 1879, the defendant made to Fauque under the same conditions a further advance of Rs 5,000.

The plaintiffs, who are grain dealers in town, allege that during the months of October, November and December 1880 they supplied to Fauque grain and other provisions to the amount of Rs 1,926.08 and this account not having been paid by Fauque, they sue the defendant on a guarantee alleged to have been given by him to the plaintiff, that he would pay all the accounts that may

be due to the plaintiffs by Fauque for goods supplied to his estate.

There is this peculiar feature in the present case, that, according to the plaintiffs' allegations, a written guarantee, in the shape of a letter, was at one time given by Brémon to Comty, but the letter was returned to the Defendant, in the beginning of the year 1881, no reason being given in the Declaration, for the abandoning by the plaintiffs of a document, the importance of which is manifest.

On a motion by the plaintiffs for leave to prove by oral evidence the guarantee alleged to have been given by Brémon, objection was taken to this course of proceedings on the ground that, although Brémon was a trader, and the contract made by him with Fauque was on the side of Brémon, of a Commercial nature, inasmuch as in it, the Defendant took the part of a commissionnaire yet in so far as Fauque a planter was concerned the contract was civil. It was in consequence argued that, on the principle that *accessorium sequitur principale*, the obligation by which a civil contract was guaranteed could not but be civil also. It was further argued that, even supposing the Court to be of opinion that the guarantee alleged to have been given by Brémon was, under the circumstances, of a Commercial nature, yet this was a case where the Court, using its discretionary powers ought to refuse admission of oral evidence.

That first point gave rise to an interesting discussion in the course of which various arguments were put forward and authorities cited, to which the Court gave careful consideration. It seems to the Court, that although the contract known under the name of *cautionnement* is of its nature generally gratuitous and cannot in consequence be ranked amongst "*actes de commerce*" whatever be the persons, traders or non traders, by whom the "*cautionnement*" is given, yet cases may occur in which the "*cautionnement*" is given for a consideration, and the transaction then becomes commercial or civil, according to the nature of the consideration nor can the rule *accessorium sequitur principale* apply absolutely to such cases. The civil code itself article 2012, affords an exception to this rule, when it enacts that the debt of a minor, which is annullable, may be legally guaranteed; in fact, the obligation of the guarantor may differ in its cause and effect from that of the person whose debt is guaranteed.

It is easy to imagine cases, in which a

trader, for the purposes of his trade, finds his interest in guaranteeing a civil obligation, and it would be difficult in such cases to deny that such an obligation, on the part of the trader becomes a commercial nature.

This seems according to the declaration to be the position of Brémon. As a trader he entered into a contract with a person to whom he was to make advances in money, and from whom he was to receive consignments of produce. Instead of supplying money direct to Fauque, he is said to have authorized Comty to supply provisions on credit to the latter. This statement may be true or false, but if things took place as alleged, Comty helped Brémon in carrying out his contract with Fauque, and clearly, if Brémon gave the alleged guarantee he did so for the purposes of his trade and the guarantee is an "*acte de commerce*"; does it however, follow that the alleged guarantee should be proved by oral evidence? On this point the Court has felt grave doubts.

In the generality of the commercial cases which have been brought before the Supreme Court, oral evidence has been admitted without difficulty, but the Supreme Court has on the other hand refused leave to introduce oral evidence whenever it appeared that the transaction, of which oral proof was offered, although commercial of its nature, was not of those which traders, could be presumed or expected to conclude, without reducing their agreement into writing. Now the question before the Court is: can it be reasonably presumed that a person in the position of Comty, should have acted on a guarantee given by Brémon without asking for some authority in writing? The best answer to this proposition, is given by the plaintiffs who recite in their declaration that a letter was given to them authorizing them to supply goods to Fauque. It is also true that the plaintiffs also stated that the letter was returned to Brémon on his demand but, strange to say, they do not argue that there was fraud or deceit on the part of Brémon, and it seems so unlikely that a creditor should surrender the title on which his claims rests, that the Court is under a strong impression that the guarantee set forth in the letter, related not to this, but to other preceding transactions with Brémon. Further Comty was a third party both to Fauque and Brémon and the guaranteeing by Brémon of the supplies by Comty to Fauque is an extraordinary "*acte de commerce*" which commercial men are not likely and indeed ought

not to enter into except in writing. Now, three years have elapsed since the alleged guarantee was given it is not alleged that, at the time when the goods were supplied to Fauque, or shortly after, the account was presented for payment to Brémon who declined to fulfil his contract and no reason is given by the plaintiffs for not having endeavoured, by legal process to obtain payment of a sum legitimately due. All these reasons concur in convincing the Court that although the undertaking alleged to have been entered into by Brémon is of a Commercial nature, it ought not to be proved by oral evidence introduced *de plano*. It is needless to observe that oral evidence in this case is not altogether excluded, inasmuch as the plaintiffs have still in their power to examine the defendant "*sur faits et articles*" and it may well be that facts may be then elicited which will induce the Court to grant what it now refuses. But for the present the Court will not allow oral evidence to be introduced.

Costs reserved.

### SUPREME COURT

ATTACHMENT OF SALARY OF A CLERK—AFFIRMATIVE DECLARATION OF EMPLOYER—ADVANCES MADE BY EMPLOYER TO CLERK EQUAL TO LATTER'S SALARY—SPECIAL AGREEMENT BETWEEN GARNISHEE AND DEBTOR—NON ADMISSIBILITY OF ORAL EVIDENCE TO PROVE THE SAME.

*Held that a garnishee could not prove by oral evidence a special agreement entered into between him and the debtor, which was tantamount to a contract with respect to the mode of payment of a debt.*

*That the advances received by Bunel, in this case, must have been made in the shape of a loan so that salary was due to him for whatever services he performed and that consequently the effect of the attachment lodged in the hands of his Employer was to prevent any set off between the sums due by the parties to each other.*

*That Bunel's salary which was attached could not belong exclusively to the plaintiff but should be divided between him and the Garnishee in proportion of their respective claims, in as much as the plaintiff had admitted the genuineness of the garnishee's claims.*

Mc DONALD,—Plaintiff

versus

BUNEL and another,—Defendants

—  
Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor J. ROUILLARD,—Acting Puisne Judge

—  
H. GALÉA,—Counsel for Plaintiff  
A. BÉTUEL,—Attorney for the same

E. GALLET,—Counsel for Defendants  
V. BOULLÉ,—Attorney for the same

—  
Record No. 22,048.

16th April 1884.

On the 29th July 1881, the Reverend Mc Donald lodged into the hands of the "Mauritius Engrais Chimiques Company" an attachment to secure the payment of a sum of money alleged to be due by one Bunel, a clerk in the employ of the Company, to the Reverend Mc Donald.

A declaration was then and there made to the usher serving the notice of attachment, to the effect that the said Charles Bunel was the debtor of the said the "Mauritius Engrais Chimiques Company."

The attachment was validated on the 23rd November 1881, to the amount of one half only of Bunel's salary, with the usual clause that "such monies as the garnishee shall when legally called upon so to do declare to be due by him to the said defendant be paid over to the attaching party." To the proceedings in validity the garnishee was not called, but the rule validating the attachment was served on the "Mauritius Engrais Chimiques Company" on the 6th July 1882.—On the 13th July 1882, the manager of the "Mauritius Engrais Chimiques Company" was called upon to show cause why an affirmative declaration should not be made by

him as to the monies which might be due by the Company to Bunel. The affirmative declaration was however not made by Joly, acting manager, till the 10th March 1883.—In that declaration the garnishee affirmed: 1o. That on the 29th July 1881 at which date the attachment was made Bunel owed to the Company Rs. 2,600 paid to him in advance on his salaries. 2o. That on 5th of August following Bunel repaid to the Company Rs. 400. 3o. That from the month of July 1881 to the 31st May 1883 date at which Bunel left the service of the Company he had earned as Clerk at the rate of Rs. 200 per month the sum of Rs. 2,200,—that is to say a sum equal to the sum received from the Company by Bunel, deduction being made of the sum of Rs. 400 repaid by Bunel in August 1881.

The correctness of this declaration was impugned by the seizing creditor and it was contended in the pleadings that the "Mauritius Engrais Chimiques Company" was never the creditor of Bunel as alleged in the affirmative declaration. This point was, however, subsequently given up and the Court now proceeds on the assumption that, at the date of the attachment, Bunel was in the debt of the "Mauritius Engrais Chimiques Company."

An attempt was made to introduce oral evidence, in order to prove the terms of a special agreement which was alleged to have intervened between Bunel and his employers at the time when he received from them two sums of money making up the amount of Rs 2,600, mentioned in the affirmative declaration of Joly. The Court ruled that a garnishee could not prove by oral evidence a special agreement between him and the debtor which was tantamount to a contract with respect to the mode of payment of a debt.

It was however contended by the garnishee that these advances of salary must be taken by the Court in the light of payments made in advance, and it was argued as a consequence, that although Bunel did work for a certain time after receiving the sums of money as above stated, there was in reality nothing due to him by the "Mauritius Engrais Chimiques Company."

The Court does not consider itself justified in adopting the view suggested by the defendant. There is no legal evidence before the Court that, at the date of the two successive payments made by the Company to

Bunel there was an agreement made between the parties concerned that in consideration of a certain sum of money given to him, Bunel would work for the company for a specified time and the more natural inference is not that such an agreement was made but that Bunel, having borrowed from the Company two sums of money agreed to repay the Company by means of deduction from the whole or part of his salary. The money so received by Bunel must therefore have been given away in the shape of a loan, so that, salary was due by the Company for whatever services were performed by Bunel, and the effect of the attachment lodged by the plaintiff into the hands of the "Mauritius Engrais Chimiques Company" was to prevent any set off between the sums due by the parties to each other.

Another question arose during the argument, namely: whether in virtue of the judgment validating the attachment, the portion of Bunel's salary which was attached was to belong exclusively to the plaintiff as the sole party who had lodged an attachment—Authorities were cited to the Court to show that, according to the jurisprudence of the French Courts, the judgment validating the seizure when the "tiers saisi" or garnishee is a party to the same or when the judgment is notified to the garnishee is equivalent to a transfer of the debt, due by the garnishee to the party seized (*débiteur saisi*), see "Bioche saisie-arrêt Nos. 245 & seq." The authorities however refer to the cases where an attachment having been made by a creditor of the "*débiteur saisi*" and having been validated, other attachments are subsequently made by other creditors—but none of these decisions apply to a case like the present where it is the garnishee himself who claims to be the creditor of the "*débiteur saisi*" at the same time as he is his debtor to a certain amount, the claim of the garnishee against the "*débiteur saisi*" being admitted as true and genuine.

It is to be noticed that the plaintiff himself in his pleadings, does not claim any absolute right to the sum of money attached. In his declaration, after denying that the defendants were the creditors of Bunel, the plaintiff, in the third count, contends that the garnishee had no right to dispose of the salary of Bunel to his own profit in defiance of the attachment lodged by the plaintiff.

In the following count, the plaintiff pro-

ceeds to state "that even admitting for argument's sake that the defendants were the lawful creditors of Bunel the garnishee could not benefit alone and keep for himself the whole of the sums attached in his hands, which sums in such case are to be divided between the attaching party and the said garnishee in proportion to their respective claims."

Now, the plaintiff having admitted as before stated, the genuineness of the defendant's claim and the Court having rejected the defendant's contention that he was entitled to the whole of the salary earned by Bunel, it follows that the portion of Bunel's salary which has been attached, must be in terms of the plaintiff's declaration divided between him and the defendant inasmuch as the plaintiff cannot now receive more than he originally asked.

The judgment of the Court is therefore that the portion of Bunel's salary which has been attached by the plaintiff shall be divided between him and the "Mauritius Engrais Chimiques Company" in proportion to their respective claims.

Plaintiff to have one half only of his costs against the defendants.

### SUPREME COURT

WRIT OF HABEAS CORPUS.—IMPRISONMENT UNDER THREE WARRANTS OF COMMITMENT ISSUED ON THE SAME DAY AND TO RUN CONSECUTIVELY.—ILLEGALITY OF DETENTION OF PRISONER.—ORDINANCE 21 OF 1876.

*In this case the Stipendiary Magistrate of Port Louis had condemned the prisoner Carmallee on the same day to three terms of imprisonment which he ordered to run consecutively. The term of imprisonment mentioned in the second warrant which was the longest one, having expired the prisoner was brought before the Court on a writ of Habeas Corpus and the question submitted to the Court was whether the prisoner could competently be detained for the successive periods mentioned in the warrants of commitment.*

*It was contended on the strength of English*

*Authorities that "Imprisonment" might be said to commence from the moment that the prisoner was convicted of the first offence.*

*Held that the Court could not give such an interpretation to the word Imprisonment;*

*That from a comparison of the local Ordinances it was clear, as already stated in the judgment of Louis Aristide given in 1880, that the Legislature did not intend to give to the inferior Courts the power of sentencing an accused person at the same time for several offences to several penalties consecutively.*

*That the Stipendiary Magistrate had therefore no power to order that the sentence under the second and third warrant was to run on expiration of the imprisonment under the first warrant, and that, accordingly, as the prisoner had already undergone the longer imprisonment to which he had been sentenced and which he had legally to undergo he should be liberated at once.*

*The prisoner was set at liberty immediately.*

EX PARTE

PROCUREUR GENERAL

IN RE

"HABEAS CORPUS" HAJEE CARMALLEE

Before

His Honor EUGÈNE JULES LECLÉZIO,—Chief Judge  
and

His Honor JOHN ROUILLARD,—Acting Puisne Judge

JOHN Mc DOUGALL GIBSON Substitute Procureur and Advocate General,—for the Crown.

J. GUIBERT,—Attorney for the same

Record No. 22,384

16th April 1884.

In this case the Superintendent of prisons

has in compliance with a writ of "Habeas Corpus" granted on the application of the Procureur General, brought before us one Hajee Carmallee and produced the warrants under which the said Carmallee is detained by him in Port Louis Gaol. These warrants are three in number and are all under the hand of the Stipendiary Magistrate of Port Louis and dated the eleventh day of March 1884.

They bear numbers corresponding to the serial numbers of the causes to which they refer, the first to cause 79 and the second and third to cause No. 82, and they direct the incarceration of Carmallee for the periods of 16 days, of one month and of five days respectively. The second warrant contains the following words: "this sentence to run " on expiration of imprisonment under warrant in cause No. 79,"—and the third warrant "this sentence to run on expiration of " sentence under warrant 82." In this case it appears that on the eleventh of March the Stipendiary Magistrate tried the prisoner who was charged first under Art. 110 of Ordinance 12 of 1878 for refusal to perform his stipulated work and secondly for a breach of Art. 265 of the same Ordinance and at the end of the hearing he pronounced sentences respecting the charges and the costs relative to each, ordering that they should run consecutively.

The term of imprisonment mentioned in the second warrant, which is the longest one, expired on the 11th instant and the question submitted to the Court is whether the prisoner could competently be detained for the successive periods mentioned in the three warrants. The Court has already, in the case of *Hamode Essack vs Queen, Sauzier* 1877 p. 12, decided by one Judge and in the case of *Louis Aristide, Sauzier* 1880 p. 22 decided by two Judges, ruled that it was not the intention of the Legislature, in passing Article 1 of Ordinance 21 of 1876 to empower Magistrates in sentencing for several offences of which an accused person had been convicted at one and the same time, to order that the several periods of imprisonment inflicted should run consecutively.

The Substitute Procureur General, in addition to the authorities quoted by his predecessor in the case of *Louis Aristide* called our attention to 11 and 12 Victoria Capt. 43 § 25 and more especially to the ruling of Chief Justice Cockburn in the case of *Queen vs Cutbush and anor; Law Journal* 36 N. S. Magistrates Cases p. 70, and submitted to us that

the words "*already imprisoned* under sentence for another offence" contained in Article 1 of Ordinance 21 of 1876 may be construed as they were in England, that is to say that imprisonment may be said to commence from the moment the prisoner is convicted of the first offence.

We have given full consideration to the authorities quoted by the learned Substitute, and which do not appear to have been mentioned to the court in 1880 in the case of *Louis Aristide*, and we regret we cannot adopt the interpretation given by the Judges in England to the word *imprisonment* in 7 and 8 Geo: 4. C. 28 § 10 and in 11 and 12 Victoria C. 43. § 25.

Chief justice Cockburn who appears to have had some doubts during the argument of *Queen vs Cutbush* about the true interpretation of the word "imprisonment," and who in delivering judgment, expressed the opinion that it is by some degree of technical straining that imprisonment may be said to commence from the moment the prisoner is convicted for the first offence, finally adopts what he calls the fairly possible construction of the statute principally because, after comparing the terms of Section 25 of 11 and 12 Vict: C. 43, which deals with the powers of the justices of the peace, with the terms of Section 10 of 7 and 8 Geo: 4 C. 28 which contains the powers of the judges in cases of felony, he finds that they are substantially the same and the practice of the judges at the central criminal court and upon the circuits having been for a long series of years to pass sentences of imprisonment under the last mentioned act for two or three offences making them, as the case might be, to commence at the expiration of the sentence first awarded. He comes to the conclusion that the statute concerning the justices of the peace should be construed by the light of that long practice which had prevailed under a similar and corresponding enactment.

But here in Mauritius a comparison of the terms of our Local Ordinances must lead us to a different result, as already stated in the judgment in *re Louis Aristide*. At first under Ordinance 85 of 1852 which is the organic law of the District Court on the criminal side, District Magistrates had no power to postpone execution of sentences pronounced by them.

Ordinance 29 of 1853, commonly called the Criminal Procedure Ordinance, by its article

133 gave power to the Court of Assizes, when passing sentence on a person already imprisoned under sentence for another crime, to award imprisonment for such subsequent offence to commence at the expiration of the imprisonment to which such person shall have been previously sentenced.

Ordinance 21 of 1876 by its Article 1 gave exactly the same powers to District and Stipendiary Courts.

If these were the only enactments concerning this matter we might *by some degrees of technical straining* according to the words used by chief justice Cockburn, adopt the interpretation given in England to the word "imprisonment." But it appears, as it was already stated in the judgment in *re Louis Aristide*, that our local legislature did not think that Article 133 of Ordinance 29 of 1853 was sufficient to allow the Assize Court to sentence an accused person *at the same time* for several offences to several penalties consecutively, for it was deemed necessary specially to provide for this case and to give this power by Article 134.

Now, this last enactment has not been reproduced in ordinance No. 21 of 1876 which reenacted almost verbatim article 133 of ordinance 29 of 1853.

We were told by the learned Substitute that it is to be presumed that the legislature having under its eyes in 1876 the jurisprudence of the courts of England did not think it necessary to re-enact in favour of District and Stipendiary Courts article 134 of Ordinance 29 of 1853 which, if that jurisprudence be adopted here, would become practically useless.

We do not think that in dealing with the interpretation of penal laws, we can adopt an argument of this kind; we are in presence of two laws, one concerning the powers of the Court of Assizes which contains two provisions, the second much more extensive than the first, the other law concerning the powers of District and Stipendiary Courts which reproduce the less extensive provision of the former law, we must unavoidably come to the conclusion that the legislature did not intend to give to the inferior Courts the same powers which were conferred on the superior Courts.

We therefore rule that the Stipendiary Magistrate had no power to order that the

sentence under the second and third warrant was to run on expiration of the imprisonment under the first warrant.

With regard to the third warrant we think that it is by mistake that the Magistrate issued it for unpaid costs due in cause No. 82 in which he had sentenced the prisoner to one month imprisonment for breach of article 265 of Ordinance 12 of 1878, the number of days of imprisonment in lieu of unpaid costs might have been included in the second warrant as part of the same sentence in the same cause as he did in the first warrant.

We therefore hold that the second and third warrant being issued in the same cause No. 82 are in reality but one and the same warrant for 35 days imprisonment; as this is the longer imprisonment to which the prisoner was sentenced on the eleventh day of March it is one which he had legally to undergo, and as he has now undergone it, he should be liberated immediately.

## SUPREME COURT

### APPEAL FROM JUDGMENT OF SENIOR DISTRICT MAGISTRATE OF PORT LOUIS—ACTION IN CANCELLATION OF SALE—FRAUD OF VEN- DEE—REVERSAL OF JUDGMENT.

*One Natoo, an arab merchant, on 9th August 1883 bought from appellants 300 bags of Madagascar rice on condition that he would give them an acceptance for the account thereof to order at 3 months date. On the 14th August, Natoo took delivery of 250 bags himself, the rest having been sold by him to a customer who took delivery of his 50 bags himself from the appellants' Store-keeper. On the 15th August, Natoo absconded from Mauritius without having granted the acceptance, and was, on the same day, adjudicated a bankrupt. While this transaction was going on, the suspicion of being an accomplice in a crime hung over Natoo, and he absconded fearing that he would be apprehended.*

*Such being the facts, the appellants, then plaintiffs, entered an action before the Senior District Magistrate of Port Louis against the accountant of Natoo's bankruptcy, asking for the cancellation of the sale of the rice, and that it be restored to them, and that*

*in case it had been disposed of, they asked that the value thereof be paid to them by preference over all the other creditors of Natoo.*

*The District Magistrate having ruled that there was no proof that at the time of the contract Natoo had the intention of defrauding the vendors, dismissed the case.*

*The plaintiffs appealed. Held by appellate Court, that in this case, Natoo, the vendee, under the color and pretence of doing business and of carrying on the ordinary course of his trade, obtained goods without intending to pay for the same from the vendors and so defrauded them, and that these latter were accordingly entitled to recover those goods.*

*The Court therefore reversed the Magistrate's judgment and gave decree for the plaintiffs in terms of their plaint.*

—  
A. DUFF & Co.,—Appellants

versus

TRUSTEES OF THE BANKRUPTCY  
JACKARIA HAJEE NATOO, Respondents

—  
Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor JOHN ROUILLARD,—Acting  
Puisne Judge

—  
H. GALÉA,—Counsel for Appellants  
A. ROLANDO,—Attorney for the same

W. NEWTON—Counsel for Respondents  
F. ROBERT,—Attorney for the same

—  
Record No. 798

22nd April 1884

On 9th August 1883, Natoo bought from appellants 300 bags Madagascar rice at the price of Rs. 5.50 the hundred pounds, on condition that the said Jackaria Hajee Natoo would give to the appellants an acceptance for the amount thereof to order at three months date according to the custom of trade. On 14th August, Natoo went to the appellants' broker, and got from him a delivery order, on the

appellants' storekeeper, for delivery of the 300 bags of rice. He took delivery of 250 bags of the rice himself, but having sold 50 bags to a customer, these last were directly delivered to that person by the appellants' storekeeper. Next day, the 15th, Natoo absconded from Mauritius, without having granted his acceptance for the value of the rice, and was, on the same date, adjudicated a bankrupt. It appears that, while the above transaction was going on, the suspicion of being an accomplice in a crime hung over Natoo, and that he absconded fearing that he would be apprehended.

In these circumstances, the appellants raised action in the District Court of Port Louis against the accountant of Natoo's bankruptcy, narrating the above facts, and, on the ground of fraud, asked the Court to decree the cancellation and nullity of the sale of the said Madagascar rice, and that it be restored to them, and, in case any part thereof has been disposed, to condemn the defendant to make good to the appellants the proceeds of value thereof by preference over all the other creditors of Natoo.

After proof, the District Magistrate has, in effect, found that no fact or concurrence of facts shewed that, at the time of the contract, Natoo had the intention of defrauding his vendors, and that, that is the time, when it must be shown that his contract was vitiated, and that, what took place afterwards, is not proof of bad faith.

It is now settled law that, in a contract of sale, there is no valid consent on the part of the vendor, if the consent given was obtained by fraud, and further, if goods have been delivered to a trader by fraud, the property thereof does not pass to the trustees of his bankruptcy, and the contract is voidable at the instance of the injured seller. It is only necessary to refer to the law, as it is stated, in the case of *Hadjee Sheriff Ismaël vs. the official and trade assignee of Atching and Aman* (*Sauzier's Reports* 1877 page 120 and also page 1.) The question to be solved may be stated thus: has the vendee, under the color and pretence of doing business and of carrying on the ordinary course of his trade, obtained from the vendor goods without intending to pay for the same, and so defrauded the owner thereof?

In the present case, it was strongly argued, for the respondents, that the absconding of the bankrupt, on the day after the delivery of



the goods, was accounted for by his fear of apprehension under a criminal charge, but that that had no effect on the contract and the delivery of the goods, and that there was here nothing but a breach of the obligation to give the acceptance; but in the first place, as the absconding took place early in the day of the 15th, Natoo having been made a bankrupt the same day, it is clear that, on the previous day, he must have been aware of his position and the steps which he took of going to the appellants' broker and asking the delivery of the bags of rice, must be looked on as a mere pretence of doing business and to conceal and cloak his intention of flight early on the following morning. The contract which he made with a third party for the sale of 50 bags of rice, and the delivery of these to him directly from the appellants' stores must be regarded in the same light as an effort to appear to be going about his ordinary course of business. It was explained by the respondents' counsel that the inquiry into the case of crime, which has resulted in the trial of two persons for the forgery and uttering of documents to obtain a quantity of oil, had been proceeding for some time in the Magistrate's Courts, and that Natoo's examination, as a witness, had produced a strong suspicion of complicity in the crime on his part. But if that be so, his absconding shows a criminal consciousness, and he must have known and foreseen that the result of his action would be the bankruptcy of his estate and the utter impossibility of his ever fulfilling his part of the obligation in the contract. That certainly must have been the state of matters on the 14th August, when delivery was obtained, and the Court thinks that it must be held to have been also the position of the matter five days previously when the contract was made. Natoo must have known then equally well that his conduct, in a certain matter, could not face the light of the day, and his guilty consciousness was then as strong as on the day of delivery. If that be so, it is easy to come to the conclusion that the goods were fraudulently bought without any intention to give the acceptance and pay the price, and that the vendor is entitled to recover them.

We therefore reverse the judgment of the District Magistrate and grant decree for the plaintiffs in terms of the conclusions of the plaint, with costs both in this and the lower Court.

## SUPREME COURT

WRIT OF MANDAMUS.—NOTICE OF APPEAL.—  
SECURITY BOND.—DELAY. — ARTICLE 51  
AND 63 OF ORDINANCE 34 OF 1852.

*In this case the applicant moved for a writ of mandamus ordering the District Magistrate of Pamplemousses to receive a notice of appeal against a judgment delivered by him against applicant. This latter on the last day for lodging an appeal appeared before the Magistrate with a notice of appeal in due form and offered as securities two persons whom the Magistrate refused to accept. As it was late, the Magistrate returned the notice of appeal to applicant and told him that he would be willing at his private residence, to receive the sureties, if proper ones were offered. Applicant did not avail himself of the offer and now prays that the Magistrate be compelled to receive his notice of appeal.*

*The District Magistrate shewed cause and contended that under Article 63 of Ordinance 35 of 1852 no writ of mandamus could issue to remove his judgment before the Supreme Court, and that the applicant, though the notice of appeal was returned to him, having not availed himself of the Magistrate's offer to give new securities to prosecute his appeal, could not urge any ground of complaint.*

*Held that a writ of mandamus could issue in cases analogous to the present, and that it is indeed the proper remedy.*

*That Article 63 of Ordinance 34 of 1852 did not apply in as much as it is not necessary in order that the writ of mandamus should be issued, by which a Magistrate is ordered to do, or abstain from doing a certain thing that the cause or matter pending before the Magistrate should be removed before the superior Court.*

*That Article 51 of Ordinance 34 of 1852 should not be construed strictly and that accordingly the Magistrate ought, in this case, to have received the notice of appeal, independently of the security bond, leaving to the competent Court to decide whether the security was given within sufficient time or not.*

*The Court therefore ordered that a writ of*

*mandamus should issue against the Magistrate compelling him to receive "nunc pro tunc," the notice of appeal tendered to him by applicant.*

PIERRE PATRON,—Plaintiff

*versus*

THE DISTRICT MAGISTRATE OF  
PAMPLEMOUSSES

and

HEIRS AUGUSTE,—Defendants

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor JOHN ROUILLARD,—Acting

Puisne Judge

A. HUGUES,—Counsel for Plaintiff  
T. NICOLAS,—Attorney for the same

T. L. JENKINS,—Counsel for Defendants

Record No. 22,349

22nd April 1884

This is an application for a writ of mandamus made under the following circumstances:

On the 27th February last, the heirs Auguste obtained judgment in the District Court of Pamplemousses against one Patron. On the 3rd March, that is, on the last day for lodging an appeal under article 60 of Ordinance 34 of 1852, Patron appeared before the District Magistrate with a notice of appeal in due form, which he handed over either to the District Magistrate or to his clerk, and offered as sureties two persons whom, no doubt on valid grounds, the Magis-

trate, after inquiry, declined to accept, whereupon, as the hour for closing the Court had come, the Magistrate gave back the notice of appeal to Patron, informing the latter, at the same time, that he would be willing, at his private residence in town, to receive the sureties, if proper ones were found. Patron did not go to town, and now prays that the Magistrate be ordered to receive the notice of appeal.

The learned Magistrate, through his counsel, pleaded 1o. that a mandamus could not be obtained against him, as under article 63 of Ordinance 34 of 1852, no judgment of a District Magistrate can be removed into the Supreme Court, by writ of error, certiorari or otherwise; 2o. that, although he returned the notice of appeal to Patron, he allowed Patron to come to the Magistrate's residence after business hours to give security, and that the applicant cannot, in consequence, urge any ground of complaint.

The Court, after due consideration, cannot adopt the interpretation given by the learned Magistrate to article 63 of the District Court Ordinance, to the effect that no mandamus of this Court can issue in cases analogous to the present one. It is true that the article, above referred to, enacts that no order of a District Magistrate shall be removed to a Supreme Court, except in the manner and according to the provisions set forth in the Ordinance, and the writ of mandamus is not mentioned in the Ordinance as one of the remedies allowed to suitors, but article 63 does not find its application here, inasmuch as it is not necessary, in order that the writ of mandamus should be issued, by which a District Magistrate is ordered to do, or to abstain from doing a certain thing, that the cause or matter pending before the District Magistrate should be removed to the superior Court. In fact, in the present case, there is no record before us, of what took place in the District Court. The point urged is simply that the Magistrate did not do a thing which it is alleged, he ought to have done, and the object of the present application is that the Court should order him to do it.

It may be well to notice that Statute 13 and 14 Vict. C. 61 from which our District Court Ordinance is, in great part borrowed, contained a clause (article 16) nearly identical with article 63 of Ordinance 34 of 1852, and before 19 and 20 Vict. C. 108 came into operation, which provided another remedy, it was held that if a Judge of a County Court

improperly declined to do any act, the proper remedy was by writ of mandamus (See *R. vs. Richards* 20 J. L. 2 Q. B. 351).

As to the second point, there is no doubt that the District Magistrate was wrong in the opinion expressed by him "that the notice of appeal is to be filed at the same moment with the security bond." They are two distinct formalities which are to follow each other in succession, and this Court has, on several occasions, ruled that the clause of article 51, which says that the Magistrate shall immediately bind the party appealing by sufficient security, is not to be construed strictly. The Court has decided that, under certain circumstances, the security might be given on the day following the notice, and even after the period of five days from the judgment had elapsed. See *Lalouette vs. Lazare Piston's reports* 1869 page 120. The duty of the Magistrate was to have received the notice of appeal, independently of any security, leaving to the competent Court to decide whether the surety was given within sufficient time or not.

For the above reasons, the Court decrees that a writ of mandamus do issue, ordering the District Magistrate of Pamplemousses to receive, *nunc pro tunc*, the notice of appeal which was tendered to him on the third of March last. No costs.

### SUPREME COURT

CHARGE OF RECEIVING MONEY BY MEANS OF FORGERY—BAIL—AMOUNT THEREOF NEED NOT BE EQUAL TO SUM ALLEGED TO HAVE BEEN FRAUDULENTLY RECEIVED.

*The applicant, who was charged with having obtained by means of forgeries large sums of money amounting in all to Rs 195,000, applied to the Magistrate before whom he appeared to be allowed to furnish bail. The Magistrate having fixed the amount of the security to Rs 200,000, the applicant moved the Supreme Court to have it reduced as it was excessive.*

*Held that the amount charged to have been fraudulently obtained should not be the sole guide of the Magistrate, but that it is material in estimating the bail.*

*That, in this case, the bail required need not have been equal to the sum alleged to have been fraudulently received, and that if the applicant could find a security of Rs 75,000 from solvent and independent sureties it would be a sufficient safe-guard for his appearance, great care being taken however, that the securities offered should have no interest in the escape of the accused.*

CAMAL BOUDOU,—Applicant

versus

QUEEN,—Respondent

Before

His Honor EUGÈNE JULES LECLÉZIO,—Chief Judge.

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—Puisne Judge

T. L. JENKINS— } Counsel for  
and  
L. ROUILLARD— } Plaintiff  
A. ROHAN— }  
and  
E. CHAILLET— } Attornies for the same

JOHN Mc DOUGALL GIBSON,—Counsel for Respondent  
J. GUIBERT,—Attorney for the same

Record No. 22,378.

23rd April 1884.

The applicant was arrested first on the 28th February last on a charge of having received a sum of Rs. 42,000 by means of forgeries committed by one Perombelon in the Books of the Oriental Bank Corporation; he was released on furnishing security to the amount of Rs. 40,000, but he was on the 4th March last arrested again on another charge of having received a sum of Rs. 153,000 by means of forgeries committed by the same Perombelon in the Books of the same Banking Company, and he was then asked to fur-

nish security to the amount of Rs. 200,000 to be bailed out.

The preliminary enquiry has been going on before the District Magistrate of Port Louis, since the beginning of March and as the case is a complicated one it may not be over for several weeks. The motion now before us is that the amount of the bail being excessive it should be reduced by the Court. It was said that the said security required being of such a large amount the Magistrate might as well have refused altogether the application for being bailed out. There is no doubt that in matters of felony in England, and of crime here, there is a discretionary power vested in the Magistrates, subject to the control and supervision of the Supreme Court, to decide, according to the circumstances under which an accused person appears before them for examination, whether he should be bailed out, or not, until the charge has been sufficiently investigated into.

The question to examine is the probability of an escape on account of the nature of the charge and the position of the accused. In this case the Magistrate appears, from what was stated to us by the Substitute Procureur General, to have considered that the accused having carried on a large business as a trader for several years, being an influential man in his class and having such rich friends and relations mixed up with his affairs, their interest would be to make him escape and that if he required a security below the sum which the accused was charged with having received the ends of justice might be defeated. The forgeries, by means of which the accused is charged with having received such large sums, are alleged to have begun in 1879 and to have continued successively up to this year, and it was said on behalf of the accused that the charge was not therefore that he had received quite lately a lump sum of Rs. 200,000, but divers sums at different times in the space of four years, and that it was not likely that he or his family had now such a large amount at their disposal, more especially after the seizure of all his property which had recently taken place.

The principle on which parties are committed to prison by Magistrates previous to trial is for the purpose of ensuring the certainty of their appearing to take their trial—it then becomes necessary to see whether the offence charged is serious and whether the punishment for the offence is heavy. In this case there is no doubt that the offence is very

serious and that if the accused is convicted he may be sentenced to a heavy punishment. The risk the accused is running is great, his interest to escape is if he is guilty must be equally great. No doubt the amount charged should not be the sole guide of the Magistrate but it is material in estimating the bail. However we think that the bail required in this case need not have been equal to the sum alleged to have been fraudulently received, and that if the accused can procure a bail of Rs. 75,000 from solvent and independent sureties it will be a sufficient safeguard for his appearing before the Magistrate. It will be understood that in reducing the bail to that amount we consider that the Magistrate should be very careful as to the sureties that may be tendered, he must especially in cases of this nature examine not only whether they are solvent, but whether they are independent and have no interest in the escape of the prisoner. If those precautions are taken we believe that the rights of all parties will be equally protected by the reduction of the bail to the sum mentioned by us.

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## SUPREME COURT

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**ACTION IN DIVORCE FOR ADULTERY.—EVIDENCE NOT CONCLUSIVE.—PLAINTIFF ASKS BE TO ALLOWED TO ELECT TO BE NONSUITED.—COURT TAKES TIME TO CONSIDER.**

*This is an action for divorce on the ground of adultery committed about six years ago. The husband had lost his senses and, having recovered, enters this action. A considerable amount of familiarity is shown to have existed between the defendant and her alleged paramour but this is explained to a certain extent by the fact that they were brought up as brother and sister.*

*Held that there was not sufficient proof to grant the divorce prayed for.*

*The plaintiff's Counsel having moved to be non-suited the application was resisted and the Court took time to consider.*

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CANTIN THE HUSBAND—Plaintiff

*versus*

CANTIN THE WIFE—Defendant

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Before

His Honor A. MURE—Puisne Judge

and

His Honor J. ROUILLARD, Actg. Puisne Judge

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JOHN Mc DOUGALL GIBSON,—Substitute Procureur and Advocate General "Ministère Public"

A. BOUCHERAT,—Counsel for plaintiff  
E. CHAILLET,—Attorney for the same

Y. JOLLIVET,—Counsel for Defendant  
T. NICOLAS,—Attorney for the same

—

Record No. 22,266

1st May 1884.

*His Honor Mr. Justice Mure* :—The Court does not think it necessary to take time to consider in this matter, and that we could not come to any clearer or more certain determination in the matter than we have already come to.

Undoubtedly this is not an ordinary case of divorce, it is the case of a man who having lost his senses and, having recovered, thinks it necessary to bring an action of divorce against his wife for acts which are alleged to have happened a very considerable period of time ago; now it is perfectly clear that to make out a case of adultery in such circumstances the proof must be certain, and we must have no doubt left on our minds that adultery was committed at the time and in the way alleged. Let us consider the allegations of the petition and let us consider the amount of proof we have had adduced to us in support of the petition.

There are four acts of adultery as alleged in the petition; the first, it is said, took place on the 10th October 1878, the second on the

4th November 1878, the third in July 1878, and the fourth refers to acts which took place in August and September 1878. The proof we have had submitted to us in support of these allegations is undoubtedly peculiar. It is a case requiring careful consideration and careful handling. If we had here a case in which the evidence of the plaintiff was supported by independent witnesses, we would be entitled to say that there was sufficient evidence upon which we could proceed; but what have we? In the first place we have nothing but the evidence of the plaintiff himself of the adulteries alleged to be committed upon the two first occasions stated in his petition. There is not the least confirmatory evidence of any kind with reference to these, and this leads me to say that the allegations made by this petitioner require to be considered with reference to the party who is the alleged paramour.

The defending wife and the alleged paramour had been brought up, as was said to-day, as brother and sister from childhood. Before the marriage, the plaintiff, Cantin, had procured, for the subsequently alleged paramour, Lobie, a situation on the same Estate as he himself was employed upon. Cantin and Lobie were then friends and they lived in the same house before the woman came to it. To that house is brought, after the marriage, the person with whom Lobie is brought up by the same old gentleman, Mr de Boucherville, like brother and sister. In such circumstances a certain amount of familiarity is to be expected, which could not be justified in other circumstances. But what is the familiarity which we have, and upon which we can rely? The familiarity alone, upon which we can rely in this case, is that which has been spoken to by Lepradour, who says he saw the two in the "salon" and he saw the woman in Lobie's room, and the worst feature of the whole, according to him, is that he saw the two once sitting on a folding bed. Now the remarks of the Substitute Procureur General, on that matter, are perfectly just, that in the circumstances of the great intimacy of these two people from childhood, the fact of the woman probably attending to the domestic wants of the house and cleaning the room and making the bed of this man, does not carry us very far to prove the fact alleged in regard to the two, but it does not carry us far in the way even of the suspicion of improper familiarity. That is the whole length to which Lepradour's evidence leads us. We come then to consider the case apart from that and we have the unfortunate

fact to consider that it is alleged by the plaintiff's counsel now, that he was deprived of his reason by the improper conduct of his wife. There is no distinct evidence of that. On the contrary, there is a strange mixture of rambling habit and peculiar traits of conduct, at the very beginning, before we know of this matter at all, so that it is not certain that we can say that this insanity was caused by the conduct of his wife. On the contrary, it is quite conceivable that the man, having taken up a feeling in regard to his wife, was, through the want of his senses, apt to magnify what he had seen and to consider what he saw as very grave and wrong and improper conduct. At any rate, it is impossible, for a Court of justice, in considering whether the marriage tie should be dissolved, to proceed upon what a man says, who was bereft of his senses, at the time, or who was in such a mental state, that he was sought to be interdicted and as to whom the Court thought that a "conseil judiciaire" was, at least, necessary. Let me say, finally, that these alleged acts were wholly without any confirmation. When we know that there was a domestic in the house during the whole time, if there had been that system of indiscriminate improper conduct, that we are asked to believe by the plaintiff's counsel, it would have been easy to procure evidence by applying to that domestic which would have confirmed the husband in this matter. I have no doubt that he could have been traced, and it is a significant fact that he is not here to-day.

We have now to consider the evidence of Caboche. I do not, in the least, mean to say that Caboche's evidence is an entire invention, that he is a perjured man, the question is whether we are entitled to proceed upon it in perfect safety and to consider it as forming full and sufficient proof of this woman's adultery. It is perfectly clear, to my mind, that Caboche's evidence is the only important evidence in this matter. Now, there are a great many peculiarities about this man's evidence, he was not an intimate friend of Lobie's, though he knew him, and it is said that, on two occasions, both about two o'clock in the day time, he pushed the door open, opening straight from the street into Lobie's room, and, on both occasions, he found Lobie and the defendant actually in the act of adultery. That is his story, and it is remarkable in several ways; it is remarkable, in the first place, that these appear to have been the only occasions upon which he went into this room and he found these two people doing

that act, on each of the only two occasions, he ever went there. It is remarkable for this, that, on the first time, this took place in his presence and, though it is conceivable that the two engaged in this guilty intercourse, might have been caught once, it is inconceivable that they would have been caught a second time in the same way. They knew that it was this man's custom to come in straight from the street, to push the door open and to give no notice of his approach. They knew it by the first act, and yet they allowed him, according to the evidence, to find them a second time in the same act, at the same hour, having taken no precaution. These seem to me to be remarkable facts, connected with this evidence, which give it very great improbability.

We cannot deny that a certain suspicion hangs over the conduct of the defendant in this case, but when we come to consider whether there is complete and sufficient evidence for us to dissolve the marriage tie, we are of opinion that there is not, and that there is not sufficient proof to justify the Court in granting a divorce. The circumstances certainly are very peculiar and occur very rarely for the decision of the Court, but the Court is not satisfied that there is sufficient proof to entitle them to proceed to the grave step which the petitioner desires, and we think therefore that this petition must be dismissed.

Mr Boucherat, counsel for plaintiff, moves to be allowed to elect to be nonsuited and, after hearing counsel for the parties and the Substitute Procureur General representing the "Ministère Public", the Court takes time to consider.

## SUPREME COURT.

### ACTION IN DAMAGES FOR LIBEL AND SLANDER.

—RIGHT OF A FATHER TO PUNISH HIS CHILD WITH MODERATION. — EXCESSIVE FLOGGING BY A FATHER PUNISHABLE BY LAW. — LIBERTY OF THE PRESS.

*Held on the evidence led in this case that the plaintiff and his brother in law had given to one of plaintiff's boys an unmerciful flogging going beyond that correction which*

*a father is entitled by law to administer to a child within the privacy of his own home, and that in consequence the plaintiff became liable to punishment under the Penal Code of this Colony ;*

*That when law and order have been violated, if a writer commenting thereon, makes statements which fairly and properly and legitimately arise out of the conduct of the person who complains, and when those statements are honest and well founded, then such statements so made are for the public benefit and cannot be made the subject of an action ;*

*That the defendants in publishing in their newspaper " the Cernéen " a fair statement of the events which had happened had referred to a breach of the penal laws, and that therefore that publication was made for the public benefit ;*

*That the defendants in their article of the 2nd February 1883 published a true comment on the language and interviews which the plaintiff forced upon them ;*

*That the plaintiff having brought the whole of what he complained of upon himself the imputations on the plaintiff and the publicity of the scandal he himself had created were such that the very foundation of success in his action was wanting, and that consequently he was not entitled to a verdict in his favour and to damages ;*

*That articles published by way of reply to the imputations of personality with accusations of falsehood are in a privileged position, which can set aside only by proving express malice ;*

*That the proof of malice was wholly wanting in this case, and that as the plaintiff, both as a private and public man, boldly claimed the right of attacking his opponents, and of maintaining the perfect propriety of his own conduct, the defendants were entitled to take up their pens and repudiate the calumnies addressed to them.*

*The Court therefore for the reasons given above found for the defendants and dismissed the plaintiff's action with costs.*

**Doctor CORDOUAN—Plaintiff**

**• versus**

**JARDIN and another—Defendants**

—  
Before

**His Honor EUGÈNE JULES LECLÉZIO,—Chief Judge**

and

**His Honor ANDREW MURE,—Puisne Judge**

—  
**R. M. BROWN,—Counsel for Plaintiff**  
**A. L'HOSTE,—Attorney for the same**

**L. ROUILLARD, } Counsel for Defendants**  
**L. V. DELALAYE, }**  
**F. ROBERT,—Attorney for the same**

—  
Record No. 21,897

5th May 1884.

After a very protracted and a very painful inquiry, it now becomes the duty of the Court sitting in the capacity both of Judges and Jury, to give their decision in this case.

The case is painful from the revelations made in it of the moral tone which exists in the plaintiff's household ; whether the facts alleged to exist therein be true or false, the disagreeable nature of the inquiry remains the same, and the painful character of the facts to be considered is without mitigation. The Court further is not insensible of the great importance of the case to the parties, the character and reputation of the plaintiff as a professional man and a father is at stake and the position and rights of the press, represented by the oldest newspaper of the Colony, is also in question. These considerations add very much to the ordinary responsibility of Judges, and the weight of decision has therefore lain heavily on our minds and not without difficulty and much consideration have we arrived at a decision of the case. The plaintiff is a doctor of medicine and has practised in that capacity since the year 1864, he has been twice married, first to a Miss Pellegrin by whom he has five children alive, the eldest

Victor having been born in the year 1870, Arthur the second born on the 1st June 1871, Lucile, the eldest daughter, born in 1874, Sabine born 20th April 1876 and Adrienne 20th January 1878. He was married for a second time on the 17th March 1880 to a Miss Schneider whose sister and her husband Mr St. Félix with their children live in family with him. St. Félix now occupies himself, in return for his support and that of his family in the Plaintiff's house, with attending to the latter's business affairs and general household management. He also conducts the education of the plaintiff's boys, and when the boys were sent six months to school, St. Félix took them to Mr Dupont, the Master of the school, and either at the first or second interview with him revealed what the plaintiff calls his family secret. In this case the plaintiff has expressed his astonishment that that secret was known; but he himself and St. Félix seem to have made no secret of it. Mr. Jollivet shortly after he entered the house as a visitor was made aware of the facts connected with it, and it appears from the enquiry in this case that others were possessed of the same secret. Mrs. Cordouan in her evidence alleges that she discovered what she calls immoralities between the sons and daughters of her husband about a year before the events which have given rise to this action, and the beginning of these is traced in the evidence led in this case. The first allegation made against the children, which is styled by the plaintiff and his witnesses the first impropriety that came within their knowledge, is the trifling act of one little child putting a bit of cloth between the legs of another little child and pulling it to the other side; the next act is that of the boy Victor who was then four years and a half old and an Indian boy "a chocra" being found playing on the grass together. What was actually done by Victor and the Indian boy is nowhere stated or even hinted at, but this is the second alleged act of impropriety which we know of; but gradually very grave and serious charges are made and one is reminded of the line of the Latin Poet speaking of fame or common report which gathers strength as it proceeds and swells as a snow ball as it moves along. "Vires acquirit eundo". The proof reveals what would be an extraordinary state of facts in any household, that the father and step mother believe that the sons and daughters in the house commit some act of impropriety as between each other whenever they had an opportunity of doing so, and that the girls are locked into their rooms each night, and chained with

small chains so as to prevent their accomplishing the acts of which they are supposed to be guilty. At the time when the events occurred the eldest girl who was alleged to be one of the perpetrators of these acts was nine years of age, and the boy about thirteen, while his younger brother who is stated to be equally guilty in this respect was not eleven years of age. The extraordinary facts connected with their proceedings is that these two boys are said to have perpetrated these attempts of immorality upon their sisters together. If such an act on account of extraordinary precocity was possible, surely it would be perpetrated "*solus cum sola*" and it is scarcely credible, that two brothers would, in conjunction, act so towards their sister. It is a further remarkable fact in this case that no one has even seen or caught these children in the perpetration of any of these alleged acts, nay the boys have never been seen or caught in their sisters' room. After all this suspicion, it is surprising that the plaintiff who says he heard a noise in the direction of his daughters' rooms on the night of the 2nd of February 1883, did not rise from his bed, where he was at the time, and endeavour to discover the truth of the ideas which his wife and he entertained. The night before the children had been locked up as usual he heard a noise near the bed room of his eldest daughter and he does not trouble himself to go and see. This carelessness on his part is almost inexplicable, he had been in the custom of tying up his daughters with chains and he had fixed their beds apart in the bed room to prevent them being near each other, and here was an opportunity of testing that, which so far as his own senses were concerned, was mere suspicion, and yet he misses the opportunity. It is true that both the plaintiff and his wife allege that they had received admissions, the one from the boys and the other from the girls on which they proceeded. But it is clear that the value of these admissions will depend entirely on their character; if they were extorted from fear of punishment, their value is lost, and the proof by such an admission is of no worth in a Court of justice. It is a sad state of things which has thus been revealed in a public Court, of the truth of the allegations the Court is not satisfied, but we cannot help saying with all the solemnity which it is possible to assume from this bench that in our opinion the true security for the moral tone and propriety of a family is the existence of a pure atmosphere and a high tone existing every where in the family relations.

About 5 p. m. on the afternoon of Friday



the 2nd February 1883 on the plaintiff's return home, he found his wife and his son Victor seeking for a bunch of keys which the former had lost some days before. They were not found, and, the next we know of the matter is that the plaintiff had his two sons, the one of about thirteen years of age and the other of about eleven, tied up to a tree in his yard near his stables and there the boys were flogged first with branches of trees and then with the kicking strap of a horse's harness or, as one of the witnesses described it, a leather strap at each extremity of which was a metal ring. The flogging was performed both by the plaintiff and St. Félix while the plaintiff's wife came three times to the place begging the children to tell where the keys were and so obtain their father's pardon. The boys appear to have denounced each other in turn, induced by the pain of the flogging to do so, and thereupon the boy who was thus charged received a renewed flogging. The castigation is said by the principals concerned to have lasted only a few minutes, but other of the witnesses assert that it continued much longer. At its termination, St. Félix suggested to the plaintiff to leave the elder son where he was tied up to the tree, letting the other go free and at the same time saying that as Victor was a coward, when left for some time so, he would probably tell where the keys were.

The parties then proceeded to dine all except the plaintiff who said he was unable to take dinner and sat under the veranda. At a certain period of the dinner the plaintiff's guardian was sent to see whether the boy would now tell where the keys were, he came back reporting that the child was gone. It is curious that in all the incidental remarks made in regard to this beating, the loss of the bunch of keys appears to have been the whole cause of it. The visits of Mrs Cordouan to the place and her language, the remarks of those who were concerned and of visitors in the house and the messages sent to the boy all manifest this to be the case. The suggestion that the alleged act of immorality of the previous night was the cause, does not appear at the time, but comes up afterwards in this shape that one of the lost keys had been used to open the door of the sisters' room. Next morning the child turned up at a distance of many miles from home, at the house of his grand-mother by his mother's side, one Mrs Pellegrin, near Rose Hill.

Doctor Rogers, the nearest medical man, was sent for, and he made a careful examin-

ation and gave an official report of the boy's condition, he found him suffering from "traumatic fever" and prescribed for him accordingly.

The disappearance of the boy produced a profound sensation in the plaintiff's home, he himself searched for the boy, far and near, that night.

Next day Mr barrister Jollivet, who was a guest in the house at the time, went to inform the police of the district of the child's flight and the plaintiff himself went to the Police station in the afternoon, where he learned the Police knew where his child was. As soon as the boy had arrived at his grand mother's home, she thought it her duty to inform the Police at Rose Hill also, and Mr. Trew Inspector of Police, then, came to her house, saw the child and took his declaration. At two o'clock next morning, Sunday, the plaintiff, Mr St Félix and Dr Jollivet set off from Flacq and arrived at the house of Mrs Pellegrin at about seven o'clock in the morning. There Dr Jollivet saw the child and gave it as his opinion that he could be removed without danger, to his father's house. The Court has said that one of the most melancholy cases of family life that can be imagined has been here presented to their consideration and no picture can be imagined more sad and unfortunate than that shown by an incident which occurred at Mrs Pellegrin's house. She asked the father in the presence of the boy what the cause of this beating was, to which the father replied that it was an act of immorality done by the boy to his sister, the plaintiff's evidence then goes on to say that the boy admitted this allegation to his grand mother, her evidence however is to the effect that the boy made no answer, and when his father shortly after temporarily left the room, he burst into tears and begged his grand mother not to believe what his father had just said, he assured her that it was not true. This same boy a few minutes afterwards was taken from the house by his father, St Félix and Dr Jollivet to Rose Hill Police station, where he made in the presence of his father, and St Félix and Dr Jollivet a minute statement admitting these alleged immoralities. The Court has already said that upon the proof which has been tendered in this case we are not satisfied of the truth of the allegations made about the conduct of these children and we cannot but express our great regret to see that this boy whilst still smarting under the flagellation inflicted on him for his impropriety takes the first opportunity he has to repu-

diate it to that relation who, as representing his own mother, he would think it important should know the truth and thereafter, within a few minutes, in the presence of the plaintiff he gives a completely different version and unsays everything he has said half an hour before. The same remarks may be made on the two different declarations made to Inspector Trew. The conclusion to which we ought to come, at the least, is, that the admission of this child is perfectly unreliable and that it would not be right for a Court of Justice to draw a conclusion of the truth of these allegations from his confession. The child was taken to Flacq and according to the evidence of the plaintiff and his witnesses, played during the rest of the day with his brother and even climbed a cocoanut tree, by means of a ladder, as stated by one of the witnesses, to get nuts to present to Dr Jollivet who was a guest in the house.

The first point for decision in this case is the extent to which this flogging was carried, was it a reasonable punishment given by a father to his child? or was it carried beyond just limits and did it become excessive and such as the law would consider illegal? The former of these positions is maintained by the plaintiff and his witnesses. The Court has carefully considered the evidence on both sides and compared the evidence especially of Dr Rogers with that of Dr Jollivet. Looking to the fact that Dr Jollivet made no report on the state of the boy's body at the time of his inspection and took no notes of what he then saw and that he is speaking merely from memory at a considerable distance of time while Dr Rogers was a man of very great experience and an acute observer, and made a careful report after a long inspection of the boy's body, the Court considers that greater weight should be given to Dr Rogers' testimony, the results of which are confirmed by that of Mrs Pellegrin, the child's sub-guardian, Mr de Comarmond, who was summoned there by telegraph by the grand mother and by that of Inspector of police Trew.

Having considered the evidence of these persons and having compared it with that of Dr Jollivet and of the plaintiff and the facts spoken to by his witnesses and the speculative opinion of Dr Beaugeard we have come to the conclusion that the plaintiff and St. Félix gave to the boy Victor an unmerciful flogging, going far beyond that correction which a father is entitled by law to administer to a child within the privacy of his own home; we are of opinion that the tying

up the boy to a tree by his wrists and ankles is an unheard of proceeding on the part of a father and that it is a mode of inflicting punishment which is known and practised in the case of convicts and not in ordinary life. Further the fact of the child having been struck from the nape of his neck to the hams of his legs so that every part of his body bore marks of ecchymoses and bruises and, as we hold proved by the report of Dr Rogers, of several vesicles thereon seems to us to leave no doubt of the extreme violence with which the boy was struck. Chauveau and Hélie whose commentary on the Penal Code is received with approbation in all the Courts of France and of this Colony in their fourth volume (5th ed. page 52) lay it down that parents have a right to punish their children but *only with moderation* and the jurisprudence of the Court of Cassation is to the same effect. (Sirey 1819, 1, 152.) Being of opinion that the moderation of punishment permitted by the law was exceeded by the plaintiff, we think he became liable to punishment under the Penal Code of this Colony. Having fixed the character of the plaintiff's act, the next question which arises for consideration is, was the press entitled to publish an account of the matter in question?

Before entering on the law, it is necessary to notice that the facts of which a narrative has been given above had become generally known in society, the child going from Flacq to Rose Hill in a railway carriage had been seen by witnesses who deposed to the state in which they found him. As the sub-guardian of the children was on the Saturday making his way to the railway station in answer to the telegram of Mrs Pellegrin which merely urged him to come immediately, he was stopped on the way by a friend who told him that the plaintiff had unmercifully beaten his child and that the latter had fled from his father's house.

On the morning of the Monday following, when the defendant Bernard arrived on the Place d'Armes, the chief central place of business of the town, he heard of it from several of the frequenters of that place.

This is not surprising. The plaintiff himself had taken the course of informing the police, besides an information had been lodged with the police charging the plaintiff and St. Félix with an offence against the criminal law of the colony, that charge had been reported at the head quarters of the police and communicated to the public prosecutor. It could not but happen that when these

officials were set in motion and inquiries were made through their agency, that the ordinary society of Mauritius should get hold of these events and pass them from mouth to mouth.

The defendants having heard like others of what had taken place, resolved to obtain as definite and reliable information as possible and one of them, Mr Jardin, proceeded to the Central Police Office where he saw the Inspector General and Superintendent of Police and having obtained information from them he returned to his newspaper's office and communicated to his colleague who then composed the first article complained of and which was published next morning in the number of the 6th February 1883.

It is important that we should consider in the first place the position before the law of the newspaper's press of this Colony; our press is free and without censorship of any kind and every newspaper is entitled within certain limits to comment upon public events, but it is true that no newspaper stands in any privileged position. On this point we refer to the authority of Lord Blackburn sitting then in the Court of Queen's Bench but now a Lord of appeal in the House of Lords who in the case of *Campbell v. Spotwood* reported in Vol. 32 Law Journal, 2 Q. B. page 185 thus states the law in regard to the position of newspapers:—"I take it to be certain that the editor or proprietor of a newspaper stands in no privileged position. He has only the right of all the public to comment upon public matters. And when a person stands in a public situation such as a Minister of State or (as the doctrine has been rather extended in modern times) where a person has done or published anything which may fairly be said to have invited comment as in the case of *Paris v. Lévy* where the plaintiff made public a statement relating to a certain extent to his private affairs but still affecting the public and by making it public invited comment upon it; in such cases every one has a right to make a fair and proper comment and as long as he keeps within that limit, what he writes is not a libel but that is not a privilege at all."

The question then is whether the statement in this article did or did not exceed the limit of a fair and proper narrative and comment of the facts which have been above detailed. We are unable to come to a negative conclusion on this point of the case. Applying the prin-

ciple above given the "Cernéen" could publish an account of the events in question provided they were true and that it was for the public benefit that the publication has taken place. It is alleged by the plaintiff that several of the phrases in this article are incorrect and the plaintiff especially complains of the following. "Plus que barbare" and "acte de férocité". The Court is unable to come to the conclusion that these words are too strong and give rise to a prosecution for libel, or slander, and so with the other observations which his counsel made on this article it is said not to be true that the boy was punished with a strap or trace, or that he had his body covered with ecchymoses and blisters full of blood, or that the plaintiff was assisted by the police in going to reclaim his son, and that a Magistrate was not present at the terrible scene, but in all these respects there is a sense in which these descriptions are perfectly correct, the Magistrate truly was present for he knew what was going on and, walking in the plaintiff's yard at a little distance, heard the cries of the sufferers; of the ecchymoses there is no doubt and the vesicles referred to by Dr Rogers account for the phrase "ampoules pleines de sang"; again though the Police did not actually accompany the plaintiff in his journey to reclaim his son, there can be no doubt he had recourse to their assistance in discovering the place of the boy's retreat, and besides we have it on the authority of the Inspector of Police at "Rose Hill" that he would not have allowed the boy to go back to Flacq, unless Dr Jollivet certified that he was able to travel. In fact the differences of phrases are so trifling from those which would be employed after all the facts have been carefully examined in a Court of Justice that it is impossible to hold that the article contains anything but a fair statement of the events which had happened.

It is necessary also to notice the question whether the publication was made for the public benefit. Now we have held that the article referred to matters touching a breach of the Penal Laws of this Colony, and that, that infraction of the Penal Law had actually taken place. The Penal Law is one, in the maintenance of which, and in the execution of which the community is deeply concerned. Society only exists and can exist when that Law is properly enforced and it is the interest of every member of society that it should be so. That being so it follows that the publication of the "Cernéen" was made for the public benefit and being so made it was no longer an illegal act. It is apparent that when law

and order have been violated, if a writer commenting thereon makes statements which fairly and properly and legitimately arise out of the conduct of the person who complains and when we are of opinion that the statement is honest and well founded, then we are prepared to say that such a statement, so made, is for the public benefit and cannot be made the subject of an action. We now come to the next article, that of 2nd february 1883, and which presents perhaps the most delicate question for our decision. It is necessary to consider the circumstances which preceded that article. If the plaintiff had acted with prudence and wisdom, he would have retired from public view for a short time, avoided intruding himself on society more than was necessary to perform the duty of his profession, and gradually the recollection of the unfortunate scandal of the 2nd february would have died out and been forgotten. Fortunately for him the "Parquet", for some reason, had resolved that it was inexpedient to have a public criminal prosecution and consequently the course now indicated would have been easy for him to follow and would probably have resulted favourably to him. In place of doing this the plaintiff, guided apparently by the advice of those immediately around him, resolved to brave public opinion and to throw himself and his family affairs before the public; as an instance of the effect of the plaintiff's conduct on the public mind we may refer to the expression of the feeling contained in a letter of one of his friends, the Honorable C. Antelme, and produced by himself; Mr Antelme tells him that "le soulèvement d'opinion qui a eu lieu contre toi semble s'être accru au lieu de diminuer depuis ton procès". Accordingly the day after the publication in the newspapers of the 6th february, of the event which had happened, the plaintiff accompanied by Mr St. Félix and Dr Jollivet visited the defendant's office to complain of the terms of the notice of the previous day and demand a rectification thereof. The defendant Bernard apparently differs very much from the other witnesses, who were present, in his account of the conversation which ensued. Mr Bernard after declining to make any change without the authority of the other defendant, who was the responsible editor of the paper, and after advising the plaintiff to wait until after judgment had been given in the case at the instance of the Procureur Général, says that the plaintiff expressed his conviction that there would be no such prosecution as it would cause a great scandal among the community; he says that St. Félix then intimated that there would be a case in Court but one in which Dr Cor-

douan would appear as plaintiff, he says too that Dr Cordouan put the question to him, if he knew why he had struck his son; the defendant Bernard replied, referring to the grave fault which was supposed to exist in his family; he says that Dr Cordouan's reply was that it was unhappily true and not an isolated case; he gave then details which can only be referred to and not mentioned and the conversation took a scientific turn upon the possible precocity of children in tropical climates and the medical and other means which might be adopted to prevent such conduct. The plaintiff and those of his friends who were present denied in many respects this version of what took place.

But considering it was a conversation at which four people were present and which is spoken to in the witness box a year after it took place, it is remarkable in how many respects Mr Bernard is confirmed by the plaintiff and his friends themselves and by the existence of facts stated by him which, after the enquiry in Court, we are satisfied could only come from the Plaintiff and St Félix. Though the plaintiff, Dr Jollivet and St Félix appear to deny much that Mr Bernard says yet, when pressed in cross examination, they admit in truth all the important facts to which he has spoken, and if, upon one point, there is no admission but a special denial, the fact that the girls' beds were fixed a part in the bed room while they were chained to their beds indicates a suspicion of facts taking place which harmonises with Mr Bernard's gravest statement. Not contented with this visit to the head quarters of his opponents, next day the plaintiff sent his son into town, in the company of St Félix and Mr Barrister Jollivet, who again paid a visit to the office of the "Cernéen" for the purpose of laying before the defendants the alleged admissions of the boy in person. On this object being announced to the defendant Bernard, he declined to listen to the boy's statement, but other newspapers offices were visited and Mr Barrister Jollivet tells us that he and the plaintiff's son Victor went to the "Planters Gazette," the "Argus" and the "Progrès Colonial." Some days having passed the newspapers of the Colony began to discuss the point whether there was to be a criminal prosecution or not. We learn from the first paragraph of the 2nd article incriminated that the "Mauritius Argus" had printed a long article complaining that the plaintiff was not in the hands of justice and strongly blaming the "Public Prosecutor" for culpable delay in bringing the case before the criminal tribunal; the

article in the "Cernéen" then taking the opposite view of the case commends the Parquet for abstaining from prosecuting, and gives the details of the reason why this abstinence should exist, referring to the two interviews which had been sought for by the plaintiff and his friends with the defendant Bernard. It is said in the article that the plaintiff charged his son and younger brother and little sisters "de crimes aussi odieux qu'invéraisemblables accompagnant son récit de détails dans lesquels la possibilité matérielle n'était pas plus respectée que la vraisemblance morale." The argument of the plaintiff on this part of the case is that under pretence of defending the "Parquet" the plaintiff was calumniated and particulars of the consideration were unnecessarily revealed, and his character blackened by representing that he went from one newspapers office to another, charging his children with crimes they had never committed. This undoubtedly is a strong position which the plaintiff's Counsel takes up; while sympathising with the criticism which is made upon this article, we have to consider whether the plaintiff should, in the circumstances, obtain damages against the defendants for this incautiously entering into unnecessary details. It is to be considered in the first place that some of the charges made by the plaintiff in this matter are not well founded; one of the gravest causes of his complaint is that the article implies that one child was substituted for another and that the true Victor Cordouan was not brought to the office to confess. The language used does not necessarily bear this interpretation. Again we are of opinion that the allusions made by Mr Bernard to what took place at the interviews are true and that he has not exaggerated but correctly stated, what took place at the interviews in question. It is said by the plaintiff that he never meant to charge his children with the full and complete act but only with the attempt, while the language used by the defendant implies the former state of matters; with this the Court cannot concur; the defendants language is indefinite, and asserts nothing positive, and is as applicable to the attempt as it would be to the complete act. Besides if the plaintiff has anything to complain of as to the supposition the world entertained in regard to the facts that he himself alleged had transpired in his household, he has himself to blame for the indefinite manner in which he spoke of such a matter which permitted the world to interpret it in more than one way. It was only when hardly pressed in Court and at the end of the case that he came out with the distinction above

indicated. Such being the facts of the case and holding that the statement contained in the article is a true comment upon the language and the interviews which the plaintiff forced upon the defendants, we have to inquire whether in the circumstances he is entitled to a verdict in his favour and to damages. This is not an action pursued in the criminal court "*ad vindictam publicam*" such an action is based on the fact that the publication tends to disturb the peace of society. But the civil action is founded not merely upon the libellous character of the action complained of but also on the falsehood of the alleged libel itself. *Folkard* in his treatise on *Slander and Libel* sets forth this principle quite clearly in two different parts of his work at page 718 (4th Ed.) in distinguishing between the criminal and civil prosecution he says: "The truth is a justification in a civil action, not solely on grounds of extrinsic and collateral policy but also because the very foundation fails on which the claim to damages might otherwise be erected, that foundation being the falsity of the defamatory charge."—The same principle is carefully laid down in his preliminary essay at page 44 of the same edition. "The truth of the imputation affords a decisive answer to an action for damages for the plain reason, that a guilty party has no right to a character free from that imputation, and if he has no right to it, he cannot in justice recover damages for the loss of it, it is *damnum absque injuria*." When we reflect that in this case the plaintiff has brought the whole of what he complains of upon himself and that while he affects surprise that the world knew his family secrets he and St Félix took the surest way of making them public by communicating them to visitors in the house and to a school Master to whose school he sent his sons only for a few months, we feel that the imputations on the plaintiff and the publicity of the scandal he himself has created are such that the very foundation of success in his action is wanting. A plaintiff seeking damages must come into Court with clean hands and a verdict in his favour with damages can only be given if he is entitled to demand from the Court that he has a character pure and free from any imputation, and which it is proper that they should vindicate. The Court feels it impossible in this instance to give such a verdict to the plaintiff and enable him to ride off triumphant in a matter which he has clearly brought upon himself.

We now come to consider the third article incriminated. It appears that the plaintiff, having secured from some news papers by his

action what he calls a rectification of the narratives which had appeared in their columns, was resolved to follow up this apparent advantage, and wrote a long letter in the "Sentinelle de Maurice" in which he makes grave charges against the defendants; he tells them that the "Cernéen" bolsters itself up by falsehoods and insinuations worthy of disciples of Rollin; now Rollin is a character in one of the most frequently read novels in French literature and is meant to represent a most unprincipled liar and hypocrite. Many other passages of this letter were calculated to excite irritation in the minds of the defendants. Though it might have been a better and wiser thing not to have noticed this, yet it is not surprising that the articles were written in the number of the "Cernéen" complained of.—We are of opinion that articles published by way of reply to the imputation of personality, with accusations of falsehood, are in a privileged position which the plaintiff can get the better of only by proving express malice.—Now this proof of malice is wholly wanting, and as the plaintiff, in his position, both as a private and public man, boldly claims the right of attacking his opponents, and of maintaining the perfect propriety of his own conduct, it is impossible to say that the defendants were not entitled to take up their pens and repudiate the calumnies addressed to them. There are several cases reported in the Books in which this principle has been given effect to; Folkard thus sums up at page 247 the principle we have founded upon "the occasion may in some cases be such that the communication is privileged on the much narrower ground that the plaintiff himself having brought the matter before the public by publishing it in a pamphlet or newspaper, the defendant, through the same channels, published the alleged libel in vindication of his character" and several cases are referred to by that author to which we also refer. Besides we repeat the argument on this third branch of the case to which we have given effect in the second.

We may here state that in considering this case we have not taken as part of the evidence the newspapers tendered by the defendants except the "Sentinelle" of the 27th of february 1883, which contains the letter of the plaintiff upon which we have just commented and which we were bound to examine in order to see to what extent the plaintiff himself had provoked the defendants and whether the latter were justified in writing the last articles complained of. At the close of this Judgment, we must say that it was with

the greatest repugnance that we have al-  
luded, as summarily as we could, to certain  
of the details which were laid before us con-  
cerning the conduct of the plaintiff's children,  
but to do justice to this case, we were com-  
pelled to do so.—We have had the sad spec-  
tacle of a father who has thought it advisable  
in the attempt to vindicate his own character,  
to charge his children with grave offences  
against morality, which it would have been  
much wiser and more expedient for ever to  
conceal within his own family.

It is but just to add that he has not convin-  
ced us of the truth of his imputations.

We must now dismiss this action with costs.

## SUPREME COURT

SUMMONS AFTER UNSATISFIED JUDGMENT.—  
INSUFFICIENT EVIDENCE TO PROVE FRAUD.  
—ORDINANCE 16 OF 1869.

*Held on the evidence led in this case that as the  
plaintiff had not proved fraud against the  
defendant, imprisonment could not be de-  
creed under Ordinance 16 of 1869 as prayed  
for by plaintiff; and that judgment should  
be entered for defendant. But that under  
the circumstances of the case each party  
should pay his own costs.*

JEAN LOUIS.—Plaintiff.

versus

MARTIAL.—Defendant.

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor JOHN ROUILLARD Acting Puisne  
Judge

V. K[VERN].—Of Counsel for Plaintiff  
F. ROBERT.—Attorney for the same

H. GALÉA.—Of Counsel for Defendant  
H. BERTIN,—Attorney for the same

Record No. 22,089

15th May 1884.

The Defendant Lefébure Martial, is brought before the Supreme Court under ordinance No. 16 of 1869, which, when a debtor has secreted or disposed of his money in fraud of the rights of his creditors, empowers the Court to order such debtor to be imprisoned. Judgment was in this case obtained by the plaintiff against Martial for \$ 278.70 but after adding the costs of the suit the costs, incurred towards the execution of the judgment and five years interest the sum due by Martial, amounts now according to plaintiff to Rs 1558.78 from which are to be deducted Rs 80 paid by Mr Notary Pitot to Jean Louis on behalf of Martial and also \$ 25 paid to Mr. Attorney Thatcher for Jean Louis. The Defendant in his examination asserts that his debt to Jean Louis has been, by successive payments, reduced to about Rs 100, but of this there is no proof. Certain sums, which were attached, have been absorbed in costs.

The defendant has no vouchers in support of his statement that he paid a great part of Jean Louis' claim by dribblets of a few rupees at a time, and the Court cannot admit in compensation of a debt of the Defendant, the amount alleged to be due by plaintiff for his use and occupation of a house belonging to one Mrs Rault which the plaintiff, by written document emanating from Martial himself, shows that he occupied as guardian only. The facts represented to the Court by the plaintiff are that the defendant has had, since the date of the judgment ample means to satisfy his debt. That although still a man of means, the money owned by him is now in the name of his wife from whom, according to contract of marriage, he is separated as to property, and it is contended that the Defendant falls within the provisions of Ordinance No. 16 of 1869, for having secreted his property in fraud of the rights of his creditor. The main facts, elicited from the Defendant in the course of his examination, or established by subsequent evidence, are as follows :—The Defendant was married to Miss Noémie Chéron in 1867 under the regime of "séparation de bien." Mrs Martial, according to the contract of marriage only owned at the date of her marriage some furniture and personal effects to the value of Rs 1000 ; — But it is also stated, in the contract of marriage that

she had a right to an unliquidated share in the succession of her mother Mrs Chéron and of her grand father Julien Beauvais. There is however no evidence of what was realised when these rights were liquidated, as most probably they have been. — In or about the year 1874, the Defendant found himself in pecuniary difficulties. — Since, on account, as he says, of the attachment, which locked up all monies which became due to him he has been unable to undertake any work. For sometime, from 1869 to 1881, he had employment at a manure establishment called "The Agricole Company" but with this exception the Defendant only busied himself in managing his wife's property ; a few years ago, a manure establishment was set up in Curepipe in the name of Mrs Martial, with reference to which the Defendant, as manager of his wife, as he says, received important sums of money, amongst other Rs. 17011.06 from Mr. Régnard ; the Defendant has also, since the date of the judgment, made in his own name a contract with the General Board of Health. He has built at Curepipe a market place and a slaughter house, the rent of which places was to be his own exclusively for a period of fifteen years, after which time, the buildings were to become the property of the General Board. The Defendant says and there is no evidence to the contrary, that his wife mortgaged some of her landed property to supply to him the funds necessary to erect these buildings, and he stated that the speculation has turned out to be a bad one, the rent not being even sufficient to pay the interest of the money advanced by his wife. These being the main facts of the case, it was argued by the plaintiff that there was sufficient evidence of the Defendant having secreted or disposed of money in fraud of the rights of his creditors and the two facts of the Defendant having managed at Curepipe a manure establishment and of having built a market place and a slaughter house in Curepipe are chiefly relied on in support of the plaintiff's contention. After careful consideration of the arguments used by the plaintiff, we have come to the conclusion that, although the fact of the Defendant having ostensibly no other means of supporting himself but from what he can get by managing his wife's property, has created in our minds a strong suspicion that the Defendant has been unduly turning to his advantage the privilege which the law of Mauritius gives to a married woman to have property distinct from her husband, still the facts of the case, when put together, cannot be construed so as to constitute a proof,



which is absolutely necessary to enable the court to apply the provisions of ordinance No. 16 of 1869, which are in a certain degree of a penal nature.

There is for instance nothing before the court to disprove the fact that the manure establishment at Curepipe is the property of Mrs Martial. It may not be her property, but there is not a tittle of evidence to that effect, and the statement of Martial on that point stands uncontradicted.—True, he is shown to have received large sums with reference to this establishment, but this fact is sufficiently explained by his managing the establishment on behalf of his wife, and it was in that capacity, that the cheques for manure sold by the Establishment were written in his name.—When we come to consider the matter of the market place and slaughter house built by Martial; he has stated without being contradicted to the Court how the money was raised, namely, by Mrs Martial mortgaging some of her immoveable properties, and then the speculation as described by Martial, has not turned out well and money has been lost as a consequence. We are inclined to believe that it might possibly have been within the power of the plaintiff to enlighten the court as to the real circumstances of the defendant's transactions and to complete the somewhat vague evidence which has been produced in this case. For instance, the Court has not even before it the real amount, which the succession of Mrs Martial's mother and grand father realised.

This may have been a large sum of money or it may have been but a small inheritance. In the latter case, it would have been difficult, for Mr Martial to explain how his wife had so much money at her disposal. Mr Mathew's evidence as to the defendant having been at one time in receipt of large sums from the Military engineering department does not clearly refer to a date subsequent to that of the judgment in Jean Louis' case and the defendant says that he does not remember having since that date, carried out any contract with that Department. It must be remembered that the defendant here is on the defensive. It is for the plaintiff to establish fraud against him; this may not be sometimes easy to prove but without that proof imprisonment cannot be decreed in terms of ordinance 16 of 1869. The Court gives judgment for the Defendant, but under the circumstances, each party should pay his own costs.

## SUPREME COURT.

ACTION IN DIVORCE FOR DESERTION—MOTION BY PLAINTIFF TO BE DISPENDED WITH SERVICE OF PROCEEDINGS ON DEFENDANT WHO IS OUT OF THE COLONY.—ARTICLE 9 OF ORDINANCE 37 OF 1882.

*In this case the plaintiff who sues in forma pauperis and asks for a divorce from her husband on the ground of desertion, moved the Court to be dispensed with serving proceedings upon the defendant who had left the Colony about three years ago, although no searches had been made by her for defendant.*

*Held that in order that a plaintiff in a suit for divorce or judicial separation on the ground of desertion or abandonment should be dispensed from serving the proceedings upon the defendant it is absolutely necessary that the plaintiff should prove that some searches have been made for the defendant even though he is out of the Colony.*

Motion refused.

LEBLÉ THE WIFE,—Plaintiff

versus

LEBLÉ THE HUSBAND,—Defendant

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—Puisne Judge.

O. LAURENT,—Counsel for Plaintiff  
E. LAURENT,—Attorney for the same

The defendant not appearing.

Record No. 22,419.

JUDGMENT OF HIS HON. MR JUSTICE MURE

15th May 1884.

This is a motion to dispense the plaintiff with service of process on the defendant under Art. 9 of Ordinance 37 of 1882. The ground stated in the motion is that the de-



fendant cannot be found. Clause 9 of the Ordinance is to this effect. "In the case of a suit for divorce or judicial separation on the ground of desertion or abandonment the Court may, if the defendant is out of the Colony and such searches have been made for him as the circumstances of the case will allow, dispense with service of the proceedings on the defendant altogether if it should deem necessary or expedient to do so."

The Ordinance insists, in the first place that the defendant shall be out of the Colony and then it proceeds to say "and if such searches have been made for him as the circumstances of the case will allow".

It was urged upon us that this man having left the Colony, it not being known where he had gone, and although it was admitted that no searches had been made for him, that yet we were entitled to dispense with the service altogether; now this is a very serious matter; it is the separation of the marriage tie and it is matter of public order; as I interpret this clause of the Ordinance it seems to me that search must be made for the defendant even though he is out of the Colony. That is the reading of the Ordinance which I adopt, for it first supposes that the defendant is out of the Colony and then it says "if such searches have been made for him as the circumstances of the case will allow". In the present case we have evidence before us that the defendant lived last in Port Louis, in Royal street, that he left the Colony about three and a half years ago, that he was a sailor, that the witnesses could not say whether he had left as a sailor but they thought he had done so; and further, we had it stated to us that no searches had been made for him. Now here is a man who leaves the Colony probably in the ordinary occupation of his life and it is sought to make out that there has been a malicious desertion of his wife. In such circumstances it seems to me absolutely necessary that there should be some search made for him and some enquiry as to the ship in which he had left and where it had gone to; all that is left in the dark, and the appeal to us is an appeal *ad misericordiam* because the plaintiff is suing in *forma pauperis*.

It may be hard that the plaintiff being a poor person should have the obligation of making searches put upon her, but this is a matter which is, as I have said, of public order, and on that account it is one in which I think we can only interpret the clause of the Or-

dinance as we do. I may refer to the case of *Ludlow v. Ludlow* (28 L. J.—P. & M. cases page 4) in which the English Court interpreted a clause of a statute much less strict than this; because it gave in the event of disappearance a substituted service whereas the Ordinance here dispenses with service altogether. It was decided that to entitle a petition in a suit for dissolution of marriage to proceed without personal service of citation, it is not sufficient to shew that the respondent is abroad and that the petitioner does not know where he is; some attempt should be made to discover and serve him. The judgment is one of Chief Justice Cockburn, Mr Justice Wightman and the judge ordinary in divorce cases, the full Court of divorce, and in a note to the judgment it is said applications have been made from time to time to the Judge ordinary to dispense with personal service on the respondent or correspondent on the ground that the petitioner did not know where to find them. These applications have been invariably rejected when no attempt has been made to discover the party, and the judge has directed that the citation be sent out and efforts made to serve them. That being the interpretation we put upon this clause of the Ordinance, and the jurisprudence in England in the matter being that which I have just now mentioned, the Court refuses to grant this motion.

## SUPREME COURT.

### MOTION TO HAVE DECLARATION AMENDED.— AMENDMENT REFUSED—NONSUIT.

*This was a motion by plaintiff to have a declaration which was directed against the wife of the defendant amended so as to make the defendant who appeared in the declaration only for the validity of the proceedings and the authorization of his wife the real defendant in the case.*

*The defendants resisted this motion.*

*Held by the Court refusing the motion, that the amendment as prayed for would completely change the basis of the action which is now directed against the defendants' wife on the ground of undue intromission.*

*Plaintiff was accordingly nonsuited with costs.*

GOKQOLA,—Plaintiff

*versus*

RUGBUR &amp; WIFE,—Defendants.

Before

His Honor EUGÈNE LECLÉZIO,—Chief Judge

and

His Honor ANDREW MURE,—Puisne Judge.

T. L. JENKINS,—Counsel for Plaintiff

J. MERCIER,—Attorney for the same

P. L. CHASTELLIER,—Counsel for Defendants

F. VICTOR,—Attorney for the same

Record No. 22,257

16th May 1884.

In this case the Plaintiff moved to be allowed to amend her declaration as follows: to strike out the name of Mrs. Rugbur as defendant, and after the words "Preat Rugbur to strike out" for the validity of the proceedings and the authorization of his said wife, "to substitute the words "acting in the capacity of mandatory of the said plaintiff", and in lieu and place of Mrs. Preat Rugbur, whenever it is mentioned in the declaration, the name of Preat Rugbur be substituted.

This motion was resisted by the defendants who moved that the plaintiff be nonsuited. It is clear that the plaintiff made a mistake when she instructed her attorney to sue Mrs. Rugbur as an intromitter, she now admits that she gave a power of attorney to Rugbur himself and wants the action to be directed against him personally by substituting him as the real defendant in his capacity of mandatory. This would be changing completely the basis of the action which is now directed against the wife of Rugbur on the ground of undue intromission. Besides, the declaration avers that a "mise en demeure" was served on the defendant which was not complied with, if the real defendant be Rugbur and no longer his wife, this "mise en demeure" cannot be of any avail to plaintiff. Again if the amendment were allowed the plaintiff would have to pay all costs up to this day, so that practically the object arrived at would not be reached. For these reasons we must refuse the amendment and nonsuit the Plaintiff with costs.

## SUPREME COURT

MOTION FOR NONSUIT.—ARTICLE 12 OF ORDINANCE 37 OF 1882.

*Held that article 12 of Ordinance 37 of 1882 does not refer to those judgments which the Court may pronounce in which the plaintiff has failed to prove his or her case, but only applies when a divorce is to be pronounced.*

*That therefore the plaintiff is entitled to move for a nonsuit, and the Court will grant one if the circumstances justify it;*

*That this case was one in which a nonsuit may be given to the plaintiff.*

Nonsuit granted with costs.

CANTIN THE HUSBAND,—Plaintiff

*versus*

CANTIN THE WIFE—Defendant

Before

His Honor ANDREW MURE—Puisne Judge

and

His Honor JOHN ROUILLARD—Acting Puisne Judge

JOHN M<sup>c</sup> DOUGALL GIBSON, Substitute Procureur General,— "Ministère Public".

A. BOUCHERAT,—Counsel for Plaintiff

E. CHAILLET,—Attorney for the same

Y. JOLLIVET,—Counsel for Defendant

T. NICOLAS,—Attorney for the same

Record No. 22,266

JUDGMENT.—Point reserved.

16th May 1884.

*His Honor Mr Justice Mure:—In this case, which is one of divorce on the ground*

of adultery, the plaintiff and defendant appeared before the Court, both led evidence and the Court delivered judgment, finding that the plaintiff had failed to prove his case. At the same time a statement was made by the Court that the conduct of the defendant had been suspicious and a motion was then made by his Counsel that he should be allowed to take a nonsuit and that the action should not be dismissed.

The defendant's Counsel opposed this motion and the Substitute Procureur General gave his conclusions in regard to the form of the order which the Court should make and referred to Article 12 of Ordinance 37 of 1872, which enacts "that every judgment for divorce shall henceforth be in the first instance a "decree nisi" and such decree shall not be made absolute nor the divorce actually pronounced till after the expiration of three months from such decree, &c." and he seemed to be of opinion so far as I was able to judge from what he said, that every decree, whether for the Plaintiff or for the Defendant should henceforth be a decree in the form stated in that clause of the Ordinance, that it should be a "decree nisi"

When we consider this Article of the Ordinance we are led to interpret it as not referring to those judgments which the Court may pronounce in which the plaintiff has failed to prove his or her case; it is when a divorce is to be pronounced that this section of the Ordinance comes into operation. We are of opinion, therefore, that this section 12 of the recent Divorce Ordinance does not affect the form of a judgment which the Court may pronounce in a divorce case when the plaintiff has failed to prove his or her case. The Ordinance of 1872 directs that divorce cases shall proceed under the ordinary forms of other cases, and that being so we think the plaintiff is entitled to move for a non suit, and the Court will grant a nonsuit if the circumstances justify it. We have referred to the case of Sapet vs. Sapet, which was decided by the late Chief Judge, Sir Adam Ellis and the present Chief Judge, Mr. Leclézio; in which they held the plaintiff entitled to a nonsuit.

We think that this is a case in which a nonsuit may be given to the plaintiff, and therefore, in this case, we allow a nonsuit with costs.

## SUPREME COURT

APPEAL FROM JUDGMENT OF STIPENDIARY MAGISTRATE—JURISDICTION OF THE SAME. CLAIM OF WAGES BY A BREAD SELLER.—ARTICLES 11 AND 12 OF ORDINANCE 12 OF 1878.

*In this case the respondent, then plaintiff, entered an action against the appellant, then defendant, before the Stipendiary Magistrate of Port Louis and claimed from him a certain sum of money for wages.*

*At the outset of the proceedings the defendant urged as a preliminary point that the Stipendiary Magistrate had no jurisdiction to entertain the case as the plaintiff did not fall under article 11 of Ordinance 12 of 1878. After hearing evidence at great length the Stipendiary Magistrate gave judgment for plaintiff.*

*The defendant appealed.*

*Held by the appellate Court that a mere bread seller does not fall under the provisions of the Stipendiary law, and that consequently the Magistrate had no jurisdiction to entertain the case;*

*That the term "gens de service" as used in article 2101 of the Civil Code which extends and applies to the several classes of persons mentioned in article 11 of Ordinance 12 of 1878, cannot be interpreted to mean that all those who were called "gens de service" in the Code fall under the provisions of Ordinance 12 of 1878, and that articles 11 and 12 of that Ordinance cannot be read in that sense.*

*Judgment of Court below reversed with costs.*

AYOUB ALLANA,—Appellant

versus

GUILLEMIN,—Respondent

Before

His Honor ANDREW MURK, — Puisne Judge

and

His Honor JOHN ROUILLARD Acting Puisne Judge

**H. HEWETSON**—Counsel for Appellant  
**A. DESVEAUX**,—Attorney for the same

**J. M. GIBSON**, Substitute Procureur and Advocate General—Counsel for defendant  
**J. GUIBERT**,—Attorney for the same

Record No. 101.

16th May 1884.

*His Honor Mr Justice Mure*:—In this case judgment was given in the lower Court for the plaintiff in the sum of Rs 40.90 with costs.

It appears that the defendant Ayoub Allana, who is the appellant in this Court, at the outset took the objection that the Stipendiary Court had no jurisdiction as complainant was not a servant defined in the Labor Law Ordinance 12 of 1878. What the Stipendiary Magistrate did is thus expressed in the proceedings of the Court—"in order to arrive at a conclusion it must proceed with the case and decide on the evidence whether such is the case or not"—that is whether the case fell under the Stipendiary law or not. Accordingly evidence was led at great length in this case for it is a simple case, both for the plaintiff and for the defendant, and finally the Magistrate, without determining the question of jurisdiction specially, simply gave judgment for the plaintiff in the sum I have mentioned.

It appears from the evidence that formerly the plaintiff was the agent of the defendant to sell bread, that he purchased from him a certain quantity of bread and sold it on his own account. On the 7th of July the appellant Ayoub Allana being desirous of finding a bread seller who would sell bread in one of his depots, engaged the plaintiff as a bread seller at the alleged rate of Rs 20 a month. This was a matter in contest between the parties, for while the plaintiff alleged he was engaged at Rs 20 a month the defendant alleged that it was at Rs 12 a month.

We have carefully read the proof with reference to the question of jurisdiction, because it was that question which was alone urged before us. It is an important question in this sense, that it is a question affecting the jurisdiction of the Stipendiary Magistrates of this Colony. They have a special jurisdiction under Ordinance 12 of 1878, created for

special purposes and with reference to a state of matters affecting a large body of the population of this Colony. It appears that this man was engaged as a bread seller and had the care of one of the depots in which the appellant sold bread entrusted to him. His principal duty was that of selling bread, but there was a subsidiary duty apparently, to keep the premises clean, as he was the only man there—he swept them every morning and in that respect he did some menial service; but his principal and primary engagement was that of a bread seller, and in that capacity undoubtedly he was employed by the appellant. The question is, does a bread seller fall under the Stipendiary law? That law defines in the 11th Section the word "Servant" and it says that "under the provisions of this Ordinance servant shall mean any laborer and shall include domestic servants field laborers, sirdars and handicraftsmen." Now we think that the position of a bread seller does not come under the words used in this 11th Section, he is not a domestic servant, he is not a field laborer, he is not a sirdar, he is not a handicraftsman, and he is not a servant in the ordinary sense of the term—A mere seller of bread is certainly not a person who we think was contemplated to be touched by the Stipendiary law.

It was urged by the 12th Section of the Ordinance which enacts that the term "gens de service" as used in Article 2101 of the Civil Code extends and applies to the several classes of persons mentioned in the preceding article, must be interpreted to mean that all those who were called "gens de service" in the Code fell under the provisions of this Ordinance and that the two clauses were to be read in that sense. With this interpretation of the 12th clause the Court cannot agree—it simply says that the term "gens de service" shall extend to the several classes of persons mentioned in the preceding article, and it does not increase the category of persons who fall under the labor law, it limits the right given whatever it may be to the persons mentioned in the preceding section.

That being the view we take of this case, we think that the Magistrate was wrong in giving judgment for the plaintiff, and we recall that judgment and find in lieu thereof that he had no jurisdiction in this case. The appeal will therefore be sustained with costs.

## SUPREME COURT.

**CLAIM OF Rs 16,273 ALLEGED TO HAVE BEEN PAID IN ERROR—PRELIMINARY OBJECTION TO THE ACTION.—ARBITRATION CLAUSE IN DEED OF AGREEMENT.—ARTICLE 1006 OF CODE OF CIVIL PROCEDURE.**

*In this case the plaintiffs claimed Rs 16,273 which they alleged had been unduly paid to the defendants. The money was paid in the course of a settlement under an agreement subsisting between the parties and ratified by deed. By a preliminary objection the defendants contended that the terms of this settlement falling under the scope of the deed of agreement, they should be settled by a board constituted under one of the clauses of the deed itself to enforce the execution of the deed and explain the terms and the sense thereof.*

*The Plaintiffs argued that they were not bound by the clause invoked inasmuch as the names of the arbitrators and the "objets en litige" were not sufficiently designated as required by Article 1006 of the Code of Civil procedure.*

*The Court sustained the defendants' objection and held that the action was premature.*

*Costs against plaintiffs.*

**COLONIAL DOCK COMPANY—Plaintiffs**

*versus*

**MAURITIUS AND ALBION DOCK COMPANIES—Defendants**

Before

**HIS HONOR EUGÈNE JULES LÉCLÉZIO,—Chief Judge**

and

**HIS HONOR FRÉDÉRIC CONDÉ WILLIAMS—Puisne Judge**

**W. NEWTON,—Counsel for Plaintiffs  
E. SAUZIER,—Attorney for the same**

**P.L. CHASTELLIER,—Counsel for Defendants  
E. DUVIVIER, & A. J. COLIN,—Attorneys  
for the same**

**Record No. 22,247**

**23rd May 1884.**

The argument we have heard in this case was upon a preliminary point in the action, which is for money alleged to have been paid in error by the Plaintiffs to the Defendants. The money was paid in the course of a settlement under an agreement subsisting between the parties, and ratified by deed; and the preliminary contention was that, the terms of this settlement falling within the scope of the deed of agreement, they should be settled by a tribunal constituted or to be constituted under clause 8 of the deed itself "pour assurer l'exécution des présentes, en expliquer les termes et le sens," after hearing and considering the exhaustive arguments of counsel upon the preliminary point, the court has arrived at the conclusions. 1o. That the subject matter of this action rests upon the proper construction of the terms and the sense of article 3 of the agreement of October 1881. 2o. That the committee of four members whose function it is under clause 8 of this deed to explain the terms and the sense of article 3 in common with other articles, has in effect been formed, and is so regarded by the plaintiffs in their letter of September 2. st 1883, rejecting the arbitration of the committee of accord upon this occasion; this execution of the agreement showing that the names of arbitrators were sufficiently designated as required by article 1006 of the Code of Civil Procedure. 3o. That the "objet en litige" is also sufficiently clear from the wording of clause 8 coupled with clause 3 of the agreement, the meaning of which the Committee will be called upon to explain in order to decide the subject matter of this action.

Being of opinion that the conditions of article 1006 C. C. P. have been fulfilled by clause 8 of the agreement, we do not think it necessary to examine the other points argued in this case.

The Court consequently sustains the preliminary objection raised on behalf of the defendants, holds that the action is premature and orders judgment to be entered accordingly with costs against the plaintiffs.

## SUPREME COURT

CORDOUAN,—Plaintiff

versus

SCHNEIDER &amp; wife,—Defendants

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor JOHN ROUILLARD,—Acting  
Puisne JudgeY. JOLLIVET,—Counsel for Plaintiff  
A. LHOSTE,—Attorney for the sameV. DELAFAYE,—Counsel for Defendants  
F. ROBERT,—Attorney for the same

Record No. 22,268

23rd May 1884.

**CLAIM OF Rs 2,109.04 DUE IN VIRTUE OF A SETTLEMENT OF ACCOUNTS MADE IN 1840. PLEA OF PRESCRIPTION OF 30 YEARS—ALLEGED ACKNOWLEDGMENT OF THE DEBT—MOTION TO EXAMINE DEFENDANT ON “ FAITS ET ARTICLES. ”**

*In this case the plaintiff as one of the heirs of his father claimed from Defendant the sum of Rs 2,109.04 as being his share in the sum of Rs 8,436.16 due by defendant's father in virtue of a document dated 10 December 1840 purporting to be a settlement of accounts between plaintiff's father and defendant's father who were then co-owners of a Sugar Estate. The defendant did not deny her father's signature but pleaded the thirty years' prescription.*

*To this the Plaintiff opposed an acknowledgment of the debt resulting from a letter written by defendant's father to plaintiff's father in 1864, and contended that in case the letter was not received as a complete acknowledgment of the debt it nevertheless constituted a commencement de preuve par écrit, and supposing it was not a commencement de preuve par écrit that plaintiff had the right to prove that such an acknowledgment was made, and accordingly proposed to hear the defendant on “ faits et articles. ”*

*The defendant strongly objected to this and contended that the presumption arising from prescription was juris et de jure and that against that presumption an interrogatory sur faits et articles could not be allowed.*

*Held that the matter at issue between parties being an alleged acknowledgment of the debt said to have been made whilst the prescription was running, and which can have the effect of interrupting the prescription an interrogatory sur faits et articles could, not be refused, not in order to lead now to the admission of a debt of more than thirty years standing but with the view to show that whilst the prescription was running in 1864, the debt was acknowledged by defendant's father.*

This is a claim for Rs. 2,109.04 representing the share of plaintiff as one of the heirs of the late Mr Cordouan, his father, in the sum of Rs. 8,436.16 of which the late Mr Pellegrin, father of the defendant Mrs Schneider, was the debtor, in virtue of a document dated 10th December 1840 purporting to be a settlement of accounts between Pellegrin and plaintiff's father, who were then the co-owners of the Sugar Estate Stanley. The signature of Pellegrin was not denied, but the prescription of 30 years was pleaded under Article 2262 C.C. To the plea of prescription the plaintiff opposed an acknowledgment (reconnai-sance) of the debt, as resulting from a letter of Pellegrin to Cordouan the father dated 3rd May 1864. It was contended by the plaintiff that the letter could not be construed in any other light than a complete acknowledgment by defendant's father of his debt. But in default of the Court giving to the letter above referred to, the effect of a complete admission, the plaintiff urged that the letter constituted a “ Commencement de preuve par écrit. ” As a last argument, the plaintiff represented that, even if the letter was not held as supplying a “ commencement de preuve par écrit, ” he was entitled to prove according to the ordinary rules of evidence, that such an acknowledgment was made, and he proposed to examine Mrs. Schneider sur “ faits et articles ”. To this the defendant strongly objected and numerous authorities were cited to show that

the presumption arising from prescription was one "Juris et de Jure." (Troplong on Art. 2226 C. C.) that against that presumption an interrogatory "sur faits et articles," or even the decisory oath could not be allowed (Marcadé on Art. 2248 § 10). The defendant further urged, with reference to the letter under date 3rd May 1864, that although Pellegrin admitted in it the existence of a debt the debt to which it referred, was not clearly designated and that besides the letter alluded to a debt due by Pellegrin to Mrs and not to Mr Cordouan. The letter could not therefore be held to constitute a "commencement de preuve par écrit."

In the statement of the law of prescription as laid down by the Defendant, the court generally agrees. In terms of the Civil Code Article 2219 prescription is a means of acquiring property or liberating one self after a certain time and under certain conditions determined by law. In the matter of a civil debt when the defendant can show that it is of thirty years standing, this very fact liberates him, irrespectively of his good or bad faith — one can therefore understand why the "serment décisoire" the object of which would be to compel the Defendant after the thirty years have expired, to admit the existence of the debt and why the "interrogatoire" of the defendant, made with the same object should not be allowed, but the defendant seems to have lost sight of the circumstance that the point at issue between the parties is an alleged acknowledgment of the debt said to have been made whilst the prescription was running, and which, in terms of article 2248 of the Civil Code, can have the effect of interrupting that prescription; now Article 2218 does not say that this acknowledgment must be in writing, It can be made verbally (see Marcadé on Art. 2248 Art. X.) As there is no special provision as to the mode of proof the "reconnaissance" can be proved according to the rules governing the mode of proof in ordinary matter (see Marcadé on Article 2248 Article X.) The "interrogatoire sur faits et articles" being one of the modes of proof allowed by our law, it seems to the Court that it cannot be refused, not in order to lead now to the admission of a debt which is of more than thirty years standing, but with the view to showing that whilst the prescription was still running, namely in 1864, the debt was acknowledged by the defendant.

On another ground also we think that the defendant has no right to object to an examination sur "faits et articles." The impres-

sion which the court has derived from a careful perusal of the letter dated 3rd May 1864 produced by the plaintiff when compared to the other documents in the case, is that although the letter does not contain the clear, precise "reconnaissance" which alone can interrupt prescription, it renders likely the fact that such a "reconnaissance" was made. There is in the first place, an admission of a debt. It is true that there is, in the letter an expression leading to the inference that it was the wife of Cordouan the father, prompted by her husband (engagée) who claimed the debt, but other passages in the letter seem to show that the debt was a personal debt of Pellegrin himself and that it was incurred with reference to the Estate Stanley, of which Cordouan the father and Pellegrin were co-owners and it has been before stated that the present claim results from a statement of accounts made between the parties in 1842. Although Mrs Cordouan appears to have written a letter to Pellegrin about a debt the hypothesis of Mrs Cordouan writing to her brother to urge on him the payment of a debt due to her husband, or more properly to the community has in it nothing which the Court can reject as improbable.

The Court will therefore admit Mrs Schneider to give her answers "sur faits et articles," confining however, her examination to the alleged "reconnaissance" made in 1864 by her father. How far her answers on a fact which took place while she was, as represented to the Court still an infant, will throw light on the point at issue between the parties, is another question on which the Court has not to give its opinion at the present stage of the proceedings, but in principle we are clearly of opinion that the request of the plaintiff should be granted.

### SUPREME COURT.

APPEAL FROM JUDGMENT OF DISTRICT MAGISTRATE—SEIZURE OF GOODS FOR RENT—INTERPLEADER.—EVIDENCE.—REVERSAL OF JUDGMENT.

*Held by the Supreme Court reversing the judgment of the Court below that, in the circumstances of this case, the landlord (appellants) in the absence of special notice that the goods seized belonged to respondent, had the right of exercising his privilege for rent upon goods of the nature of those seized.*

**COLONIAL ICE COMPANY,—Appellants***versus***PIERROT,—Respondent**—  
Before**His Honor Eugène Jules Leclézio,—Chief Judge**

and

**His Honor Frédéric Condé Williams,—Puisne Judge**—  
**V. KIVERN,—Counsel for Appellants****P. E. DE CHAZAL,—Attorney for the same****Y. JOLLIVET,—Counsel for Respondent****F. ROBERT,—Attorney for the same**—  
Record No. 802

25th May 1884.

In this case, which is an appeal from a judgment of the District Magistrate of Port Louis, the question to be decided is whether articles of furniture which had been purchased by the Respondent from a cabinet maker, Mr Marchand, and had been left by him in the shop for several months after the purchase, could be seized by the landlord for rent due to him. From the evidence, both oral and documentary, taken in the court below, it would appear that, when a provisional seizure was made by the landlord, the appellants, in May last year, Pierrot paid the amount due for rent in capital and costs to Mr Chevreau, the clerk of the attorney in charge of the proceedings, who gave an acquittance at the foot of a document which purports to record a sale of certain articles of furniture made by Marchand to Pierrot for exactly the sum then due to the appellants. Pierrot says that he warned Chevreau that he was the owner of those goods and that the acquittance at the foot of the account of sale proves that Chevreau knew that the goods belonged to him, Pierrot, and that Chevreau must have informed the attorney who, in his turn, must have brought the transaction to the notice of the appellants. Marchand also says that he told one Gentrac, the collecting clerk of the appellants, that these articles of furniture belonged to Pierrot. It was argued for the Respondent that this was sufficient notice to the appellants, and that they could not have relied upon these articles in case of non pay-

ment of rent to exercise their privilege of landlord upon their value after seizure. To this it was answered that, even admitting that it came to the knowledge of the landlord at the time of the first seizure in May last that certain articles of furniture had been sold by Marchand to Pierrot, in order to enable him to pay the rent and costs then due, it was unreasonable to leave these articles so long in the shop of Marchand without taking possession of them; that there was no special mark on those pieces of furniture which could show that they were not the property of the shop-keeper, and that the landlord, in the absence of a special notice from Pierrot, could *bona fide* rely upon them as being Marchand's goods. We think that the notice to the landlord was hardly sufficient in this case: but even if it were sufficient warning in law at the time of the sale, we further think that, the articles sold having no special marks, Pierrot ought not to have left them in Marchand's shop for several months without giving special notice to the landlord that they were his property, and that he had not to rely upon them to guarantee the payment of his rent. There is no doubt from the nature of the industry of Marchand who was a cabinet maker that these articles (an armoire and a chest of drawers) were goods which he was expected to sell upon his own account; if he had been a Commission agent, habitually selling goods for other people, the case might have been different. It is clear however from the evidence that such was not his habitual industry; and in these circumstances we hold that his landlord had the right, in the absence of special notice, to exercise his privilege upon goods of the nature of those seized, we must therefore quash the judgment of the Court below with costs.

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### SUPREME COURT

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APPEAL FROM REPORT OF FOREST LAND PURCHASE COMMISSION.—PLEA OF ESTOPPEL.—DEED OF PARTITION.—"PARTAGE A L'AMIALE".—ORDINANCE 19 OF 1868.

*These are two appeals from a report from the Forest Land Purchase Commission, by which the Commissioners valued the "Terrain Merlo" a plot of ground of 548 acres situate in the district of Moka belonging to Messrs. Desvenaux, at the sum of Rs. 88,214.43 and which plot of ground the Government had intimated its intention to*



value under the provisions of Ordinance 10 of 1881.

The Messrs. Desveaux claimed the sum of Rs. 205,800 as its value, whereas the Government contended that it was only worth Rs. 50,000 inasmuch as it had been valued at that price in 1881 in a deed of partition "à l'amiable" drawn up at the death of one of the brothers of Respondents, which deed was subsequently homologated by the Supreme Court after the conclusions of the Ministère Public.

The Government urged that the Messrs. Desveaux were estopped from maintaining that the value of "Terrain Merlo" is a much larger sum or any thing else than that fixed by the appraiser's report, as they had accepted the valuation and made it the basis of a deed of partition and of a judgment of homologation of the Supreme Court.

Held that the law of Estoppel could not apply in this case because the procedure under article 115 of Ord. 19 of 1868 was a matter between the parties who had a right to the Succession of the Respondent's late brother, while the parties to the present case are wholly different, and the object of the two litigations is also quite different ;

That the Government not having taken the plea of estoppel before the Commissioners were now barred from urging it on appeal ; because had that plea been taken it would have had for its effect to exclude all evidence in the cause, and to hold the Respondents Desveaux bound entirely by the proceedings which they had taken under the partition "à l'amiable" ;

That the proceedings followed under article 115 of Ord. 19 of 1868 and the valuation of "Terrain Merlo" made in the deed of partition must be taken as an important article of evidence and as an admission made by the Respondents to be taken along with the whole other evidence in the cause, and not as a final and conclusive fact which could prevent the Respondents from maintaining that "Terrain Merlo" is of a higher value than the sum fixed in the report of the appraiser under the deed of partition ;

And lastly that as the Commissioners had made a fair valuation of "Terrain Merlo" their report should be confirmed.

THE HONORABLE THE COLONIAL SECRETARY.—Appellant,

versus

DESVEAUX DE MARIGNY & ORS—Respondents.

—

DESVEAUX DE MARIGNY & ORS—Appellants.

versus

THE HONORABLE THE COLONIAL SECRETARY.—Respondent.

—

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Acting Puisne Judge.

—

THE HONORABLE L. COX, Acting Procureur and Advocate General, Counsel for the Honorable The Colonial Secretary.  
J. GUIBERT,—Attorney for the same.

THE HONORABLE W. NEWTON,—Counsel for Desveaux de Marigny.  
H. LECLEZIO,—Attorney for the same.

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Record No. 22,282 and 22,283

3rd June 1884.

These are two appeals from a report from the "Forest Land Purchase Commission" by which the Commissioners valued the "Terrain Merlo" a plot of ground in the District of Moka, belonging to Messrs Desveaux at the sum of Rs 88,214.48 c. and which plot of ground the Government had intimated its intention to value under the provisions of Ord. No. 10 of 1881.

The "Terrain Merlo" consists of two parts "Grand Merlo" and "Petit Merlo." The former extending to 392 acres and the latter to 156 acres of Land. It is partly wooded and partly in "Savane" and has been

sed of late years by the Messrs Desveaux to apply their mill at "Cote D'or" with fire-wood. Though it is distant about five miles from the mill of "Cote D'or," yet Mr. Marin Desveaux alleges that it was purchased by him and his brothers for that special purpose, and, in respect of that important use to which they put it, they have claimed the large sum of Rs 205,800, as its value, whereas the Government contends that it is only worth Rs 50,000 and that the Commission has thus given them Rs 38,000 beyond its proper value.

It appears that in 1881, Mr. Janvier Desveaux, one of the co-proprietors of "Cote D'or" and "Terrain Merlo" died. He and his six brothers were proprietors of large Estates in Flacq and Moka, and on his death without children, having married his wife, who survived him under the system of "Community of goods" it became necessary to fix her rights, while Mr. Janvier Desveaux's succession went to his surviving six brothers and the minors Ulcoq, the children of a deceased sister who are resident in London. His heirs took advantage of art 115 of Ord. No. 19 of 1868, by which a partition "à l'amiable" was gone into with all the formalities there required. An appraiser, Mr. Gondreville, was appointed on the 12th August 1881 by a Judge of the Supreme Court to value the properties belonging to the succession and report thereon for the purposes of the partition. That gentleman made a valuation of all the properties both in Flacq and Moka and "inter alia" he valued "terrain Merlo" at the sum of Rs 50,000. His report shews that he took two days to perform the operation of valuing "Merlo." The next important step under the article of the ordinance referred to was the execution of a deed of partition by a notary, to the procedure in which, as it is well known, all the parties interested were cited to attend. By the provisions of that deed the real Estate was attributed to the brothers Desveaux, while the minors Ulcoq were paid by a "soulte" that is a payment of money made to them in respect that the various lots of real property had fallen to their uncles. The whole of Merlo thus became the property of the brothers. The deed of partition was of necessity followed by an application to the Supreme Court to homologate it, in the course of which there being minors interested, there was a reference to the "Ministere Public" who gave a quasi-judicial opinion in favor of the homologation of the deed of partition and which was thereafter approved of by a judgment of the Supreme Court.

The ground of appeal taken by the Government is, that the respondents Desveaux are excluded from contending that Merlo being thus valued at Rs 50,000 is worth a great deal more.

The Procureur General maintains that the respondents have had a great advantage by following the procedure of the 115th article of the ordinance on judicial sales, that if the law of the Code only had existed there would have been public competition and a public sale, and that the whole of the procedure under the ordinance which altered that state of the law depends upon the valuation of the appraiser which above all things must be true and correct that the respondents having accepted that valuation and made it the basis of a deed of partition and of a judgment of homologation of the Supreme Court are now estopped from maintaining that its value is a much larger sum or any thing else than that fixed by the report.

In developing this argument it was maintained for the Crown that the Messrs Desveaux had made a contract with the "Ministere Public" and the Judges of the Court, and that the latter having by their Judgment confirmed the estimation of the report could not now give more.

No doubt it is highly reasonable and just that a solemn declaration made in circumstances the most formal and serious which can be imagined, should bind men to the good faith and truth of representations on which other persons have acted. If facts once solemnly affirmed were to be again denied, whenever the declarant saw his opportunity, there never would be an end to the confusion which would arise in human affairs. Lord Coke has defined *estoppel* thus "an estoppel is where a man is concluded by his own act or acceptance to say the truth." This is somewhat vague and indefinite and would lead, and indeed has led in the administration of the law, to strange results, and the progress of law has therefore limited that definition in various respects. Probably the best judicial definition of *estoppel* is given by Lord Denman in the case of *Pickard versus Sears & Adolphus and Ellis* Page 475.

"The rule of law, he says, is clear that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act in that belief so as to alter his own previous position, the former is concluded

"from averring a different state of things against the latter as existing at the same time." This definition has been adopted almost in the same words by Mr Justice Stephen in his *Digest of the law of evidence* article 102. Still Judges of eminence have been dissatisfied with the doctrine of estoppel, for in the recent case of *Sim versus The Anglo American Telegraph Company L. Rep. Q. B. 5 Vol. Page 200*, we find Lord Justice Bramwell remarking that "an estoppel may be said to exist where a person is compelled to admit that to be true, which is not true and to act upon a theory which is contrary to truth." The doctrine, however, is firmly established and may be taken to mean an admission made by some act or language of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects has not the right to aver against it, or tender evidence to controvert it—the fact being already admitted, the necessity for evidence is entirely superseded. The French Code seems to contain principles to the same effect and probably in all systems of law some provision will be made for the security of men acting, as all men must, upon the representations of others. Accordingly Larombière commenting on the 1356th article of the Code while laying down the doctrine that to be of any avail the "Aveu Judiciaire" must be used in the same process in which it is made, goes on to lay down the principle that from an "aveu" in a different process "on peut tirer une forte induction" (Larombière 1356 art 5). The question then which the Court has to determine is whether the law of estoppel applies to the present case. Taking the definition of the Law of estoppel by Lord Denman and Justice Stephen, we have come to the conclusion that it does not apply because the procedure under section 115 of ordinance for judicial sales was a matter between the parties who had right to the succession of Mr. Janvier Desveaux, while the parties to the present case are wholly different.

In addition to that the object of the two litigations is quite different. The procedure of the former case was adopted to regulate the rights of parties who were all members of the same family, whereas the present case seeks to estimate the value of Land as between certain members of that family and a third party. It would apply only if a question arose subsequently between the parties to the former procedure. It is impossible to hold that Messrs Desveaux have made a contract between themselves on the one hand and the "Ministère Public" and the Judges of the

Supreme Court on the other, the latter having acted merely as officials, considering whether the proceedings were regularly taken under ordinance 19 of 1868. In the present case the minors Ulcoq whose interests were determined under the former case do not now appear, and are wholly unaffected by the claim made by the Messrs Desveaux against the Government. The law of estoppel would apply if the question arose between the Messrs Desveaux and the minors Ulcoq, and if it was the interest of the former to deny the truth of Mr. Gondreville's report in the subsequent question between them and the said minors—It further appears to the Court, that the Government not having taken this plea before the Commissioners, it is now too late to urge it in an appeal Court. If it were a good plea it should have been pleaded before the Commissioners to the effect of excluding all evidence in the cause, and of holding the Messrs Desveaux, bound entirely by the proceedings which they had taken under the partition "à l'amiable". The proof should have been limited merely to the production before the Commissioners of the proceedings taken under the Ordinance in question, and they should have maintained that no other proof was necessary in the case. When the Court considers the course of procedure taken by the Government before the Commissioners, that their agent adduced a great number of witnesses who gave their Estimate not only of the value of the land, but of the wood on the land, they have taken a course which is not consistent with a plea of estoppel at all. The procedure therefore remains simply as a fact to be considered by the Court and the report of Mr. Gondreville must be taken as an important article of evidence, and as an admission made by the Messrs Desveaux to be taken along with the whole other evidence in the cause, and not as a final and conclusive fact which prevents the Messrs Desveaux maintaining that the "Terrain Meilo" is of a higher value than the sum fixed in the said report.

Subsidiarily the Government relied on the evidence laid by them before the Commissioners as supporting their plea of estoppel, and asked the Court to maintain the value of Rs 50,000 for Merlo, as the witnesses adduced by them were all somewhat under the sum in the report. As we hold that the report is only an article of evidence, we feel it impossible to take it in conjunction merely with the evidence of the crown and to leave entirely out of view, the evidence of the claimants, which may be as truly said to be good evidence in the cause as is the evidence

of the crown witnesses; coming to the evidence itself, each of the members of the Court has carefully read that evidence, and is struck by the fact of the great discrepancy between the values given by the crown witnesses and those given by the claimant's witnesses. The lowest valuation of the crown witnesses is Rs 42,540 and the highest Rs 49,427 the mean of which is Rs 44,873. None of the witnesses for the claimants value the property at a lower sum than Rs 200,600. As we read the evidence of Mr. Marin Desveaux himself he makes the valuation to be as follows:

Bare Land .. ..	Rs 109,600
Cord Wood .. ..	82,800
Severance .. ..	54,800
	<hr/>
	Rs 247,200

Some of the claimants' witnesses are even higher than this sum, so that the discrepancy is very marked indeed; coming to the details of the evidence the difference of valuation both of the land and of the wood is remarkable. The crown witnesses estimate the marshy land from 180 to 160 acres in extent, and valuing that marshy land at Rs 20, an acre, the rest of the land they value (apart from the reserves) at Rs 50 or Rs 60 per acre. The claimants' witnesses, on the other hand, value the bare land at Rs 150 to Rs 200 on an average not distinguishing between the various kinds of land. The crown witnesses maintain that the marshy land which appears to extend from 150 to 160 acres and consisting of what is termed "Boue Blanche" is wholly unfit for cultivation of any kind, while the claimants' witnesses express an opinion that that land could be easily drained, and when dried would become friable and capable of producing the very finest crops of sugar canes. When we consider the evidence given in regard to the wood, we find as great discrepancies as in the case of the Land and still greater difficulties arise from the fact that the crown witnesses differ among themselves as to the quantity of the wood on the land and the number of acres which are wooded in one or other parts of the Land. The claimants' witnesses concurred more nearly as to the number of acres which contain wood, but differ very greatly as to the value of the wood upon each portion. It is to be observed also that two of the claimants' witnesses only made one inspection of "Terrain Merlo" for a few hours, and speak from the knowledge gained during that time; others of the claimants' witnesses made inspections, which

however do not seem to have been very thorough, but were coupled with chance visits made formerly for the purpose of shooting or of pleasure. As a consequence of this cursory examination, these witnesses invariably give an average value of the whole plot of ground not distinguishing the different kinds of Land. On the other hand most of the crown witnesses made three or more inspections, and divide the Land into various categories. Comparing the evidence of the various witnesses together, it is difficult to find the means of estimating correctly and to the satisfaction of the Court, the actual acreage of the respective kinds of Land, and of the Land covered with wood and what is bare, and it is equally difficult to reconcile the great differences of value both of land and of wood as given.

In these circumstances we have been obliged to turn from the evidence led by both parties to consider carefully the opinion of the commissioners, and the grounds upon which they have based that opinion. We find that they have made five inspections getting over a certain portion of the Land at each of these—taking means, by frequently digging holes, to form an opinion of its value, and being able to form a more correct estimate of the extent of the various kinds of Lands, and of the extents of the parts wooded and in Savane, than the witnesses seemed to have been able to form. It must be remembered also that the Commissioners are skilled experts, most of them selected by the Government from their previous knowledge of the value of Land, and who for some years past have devoted themselves chiefly to the valuation of Land, and the wood thereon, considering then the evidence which is before the Court, we have come to the conclusion that of the three sets of witnesses and experts, whose evidence is to be considered, greater weight ought to be given to the opinion and views of the commissioners than to the witnesses either of the Crown or of the claimants. We see no reason to doubt after the five inspections made by such men that they have come to a fair conclusion when they say in regard to the quality of the soil of the two "Merlos".—"The greater part of it is "ferruginous more or less mixed up "with lumps of red gravel having the colour "and hardness of red bricks, although there "are some patches of free soil such land together with the "boue blanche" which is "a sort of white clay, cannot be called good, "so that, if it is not impossible to plant canes "on the two "Merlos," yet, from the evidence heard, and judging from the canes

"in the *"boue blanche"* of *"Belle Rive"* and what they saw during their several inspections, the Commission are of opinion that sugar canes could not be cultivated advantageously there, that is with any margin of profit."

If this be the quality of the soil, and its capacity to give a profit when planted with the ordinary crop of the Colony, we have no hesitation in concluding that the valuations put upon this land by the claimants and their witnesses are much exaggerated. It is true that great latitude of opinion with regard to the value of Land and as between buyer and seller especially if the sale is a forced one, is to be expected, such divergence of opinion has been noticed in almost all the cases which have come before the Court. If we relied entirely upon the evidence for the claimants, we would come to the conclusion, that the Commission had seriously underestimated the value of the *"Merlos"*. If on the other hand, we were to accept the testimony of the crown witnesses we must hold that the commission has allowed a sum of Rs 38,000, more than the true value. But, looking at what the commissioners have done, while the *"Boue Blanche"* of *"Grand Merlo"* has been reckoned as worth Rs 40 per acre, they have estimated the rest of the bare Land both of *"Grand"* and *"Petit Merlo"* at 60 and 70 rupees per acre, there are fortunately various tests, by which the Court has it in its power to consider whether there has been any great error made by the Commissioners in these valuations. We have in the first place the fact that this is the estimate of a body of men who have had great experience in the valuation of Land, and who have actually valued much land of a similar nature in the immediate neighbourhood of the *"Merlos,"*; knowing as we do that the Lands of the *"Terrain Malherbes"* and the *"Terrain Raffray"* which on one side border on the land under valuation, were recently valued by Judgment of the Commission, which valuations were in both cases fixed or confirmed by the judgment of the Supreme Court at Rs 60 per acre, and that the bare Land of these three territories is very much the same in quality, we think the value given by the Commissioners is fairly tested by a reference to what was done in these cases. This is supported by the evidence of Mr. Gondreville, who being called upon by the Commissioners to explain the circumstances in which he made the report of valuation in the partition *"à l'amiable"* was asked also his opinion of the value of the bare land. His reply was

that he believed the land to be bad for cane planting and to be worth from Rs 50 to Rs 60 per acre. He was speaking of an average, and as he has not estimated the value of the *"Boue Blanche"* apart from the rest of the Land, it may be taken that his valuation is not dissimilar from that of the Commissioners. Allusion has been made to the fact that the bare land of the property *"Belle Rive"* which lies on the other side of *"Terrain Merlo"* was valued by the Commission at an average about Rs 150, but the land was actually under cane cultivation with all the roads and other accessories necessary for the purpose. Whereas this portion of *"Terrain Merlo"* which borders on *"Belle Rive"* is composed, as seen from the plan, of swamps and marshy lands.

Their view then, seems to be confirmed by the real facts and circumstances of the case, and the Court feel that it cannot be wrong in the conclusion that the report of the Commissioners is the safest guide, by which they can be led, and presents along with the real evidence a stronger and more weighty body of testimony than that tendered by either of the parties in the cause. The Court notice that the Commission have estimated the extent of marshy land at 161 acres and 94 perches. This is their own estimate not of marsh, but of marshy land, the soil of which is the *"Boue Blanche"* so much referred to. We observe that the measurements of two surveyors Forder and Frogerays make in all a little more than 94 acres of marshes and swamps, while the evidence led reckons them at various very different figures from 20 acres, which is the estimate of some of the claimants' witnesses, to 150 and 160 acres given by two different Crown witnesses. The Court has felt some difficulty on this branch of the case. But looking to the fact that the Commissioners do not speak of marshes and swamps but divide *"Grand Merlo"* into reserves, marshy land and land which is neither reserves nor marshy, and that the quantity of marshy land fixed by them comes very nearly to that given by some of the witnesses and that that quantity has been fixed by them with reference to two other quantities of land, so as to make up the whole of *"Grand Merlo"* we do not think it expedient to interfere with the distribution of the land thus made by the Commissioners. Having carefully read the evidence and compared the views of the various witnesses, we are satisfied that the divisions of *"Grand"* and *"Petit Merlo"* into the kinds of soil fixed by the Commis-

sioners have been wisely done, and justified by the circumstances of the case.

The same course of argument applies to the valuation of the wood, and of the extent of timber, Cord Wood and charcoal which can be made upon the Land and certain portions of it. To that valuation Messrs Desveaux assent, while the Crown objects to it. In all such matters great weight must be given to the impression made upon the Commissioners by their minute inspections of the land and wood and in considering their figures and those given by one set of the witnesses we feel that the result to which they have come is based upon their own knowledge as experts, coupled with the evidence given by these witnesses, and that it is impossible for us to upset these valuations merely on the general assertion that the Commission had valued the wood at too high a figure. This general allegation was the sole criticism made on this head of the Commissioners' report and we were given no data on which we can conclude that the Commissioners have fallen into error.

We now come to consider the claim for severance made on behalf of Messrs Desveaux by Mr. Marin Desveaux and his witnesses. The sum claimed is a formidable one varying from Rs 100,000 as made by Mr. Chasteau to Rs 54,800 made by Mr. Desveaux. He maintains that he and his relations purchased "Merlo" with the view of supplying "Cote D'or" with wood and that it was their intention to put it "en coupe réglée" so as to afford his mill a constant supply of wood.

The law gives as one of the bases of the valuation of land "any diminution in value of the remainder of the land or estate belonging to the same proprietor caused by severance of the land to be acquired." (Par. 3 Section 30 of Ordinance 10 of 1881.) Two elements seem necessary in applying this provision, first that there shall be a disuniting of one piece of land from another and secondly, a diminution of value of the land which remains with the proprietor. In the present case, though "Merlo" was of great value to "Cote D'or" as a source of wood supply it is scarcely possible to say that "Cote D'or and Merlo" formed the same Estate though there was a certain connection between them by the use which the proprietors of the one Estate made of the other.

We quite admit that lands which form the same Estate need not be joined continuously and that it is enough if they be adjacent, but

the lands must at least appear to be parts of the same Estate, and the one be a dependency of the other, and so united in use and occupation that the one would naturally be sold with the other. But "Cote D'or" and "Merlo" are far separated, were acquired at different times by different titles, and have been dealt with as separate Estates in the deed of partition to which reference has been so frequently made. In it they were separately valued and the one was not thought of as part and pertinent of the other. The mere fact that "Merlo" supplied wood to "Cote D'or" no more constitutes the former an integral part of the latter, than if "Merlo" had been a coal mine from which fuel was obtained. Again has "Cote D'or" been diminished in value as a sugar Estate by the fact of the Government acquiring "Merlo"? It cannot be alleged that the quantity of land which can be put into sugar cane cultivation is diminished, for "Merlo" was never intended to be cultivated as a sugar Estate and could never have been used as a means of giving rest to any exhausted land in "Cote d'Or." It follows that "Cote d'Or" as such is unaffected by the loss of "Merlo" and its value as a Sugar Estate would be undiminished. It is sufficient for the determination of this question that there is no proof, not even the semblance of proof in the present case that "Cote D'or" as a sugar Estate would be lessened in value. We therefore reject the claim for severance. With this claim for severance is intimately connected a claim for indemnity made in respect of the deprivation of firewood, which resulted from the prohibition of the Government made on 10th May 1881. It appears that Messrs Desveaux apprehensive that Merlo would be taken from them, proceeded to secure as much wood as they could possibly fell before the proclamation was issued. This supply of wood satisfied their wants till the present year, when they were obliged to buy 500 cords of wood to add to 300 which remain of the supply they had laid in, 800 cords being necessary for the yearly supply of their mill. The Commission have given the Messrs Desveaux the intrinsic loss which the purchase of these 500 cords of wood has caused them, there being deducted from the gross price the cost of felling and transporting the timber and secondly the value of the wood itself. It was contended by the learned Counsel of the proprietors, founding upon the 4th paragraph of section 30 of the Ordinance, that as the Messrs Desveaux must for the coming year's crop and for each successive year thereafter buy 800 cords of wood for each

crop of sugar, that such expense was direct damage which must reasonably have been within the view of the parties when the Government prohibition was issued.

This is a question no doubt of some importance to Messrs Desveaux, but we think it may be disposed of very shortly. In the first place it is clear that the Commission in giving Rs 4500 of indemnity have considered that that indemnity would be due from the date of the proclamation, and has reckoned that the previous years damage has been compensated by the possession of the extraordinary supply of wood which had been obtained by the Messrs Desveaux. In the next place referring to the previous decisions of this Court, we hold that no damage is due for the mere delay which may occur in the settlement of the price which the Government is to pay. In the third place, we are of opinion that the demand for an indemnity for an indefinite number of years based on a percentage of the supposed diminished value of "Cote D'or" is a fallacious argument which cannot be admitted. If the project is carried out of completing this transaction, Messrs Desveaux will obtain for the land and wood a sum of nearly Rs 90,000, which comes in room of the subject itself and the produce with which the subject supplied them. In place of "Merlo" they will have its price and the price of the wood in their pocket, with the interest of which, if invested at the usual rate of interest in this Colony they will be able to purchase more than 800 cords of wood each year.

This can be shewn by a simple calculation, at Rs 15 each, 800 cords of wood represent a value of Rs 12,000. But from this is to be deducted the costs of making the wood, which according to the evidence cannot be stated at less than 3 or Rs 4, whilst the cost of carriage according to the evidence is not less than Rs 4. By putting the cost of making the firewood and carting it to the sugar house of "Cote D'or" at the reduced price of Rs 6, it is found that from the price of Rs 12,000, the sum of Rs 4,800 has to be deducted. This brings out Rs 7200 which represents a low rate of interest on Rs 90,000,

If the Court were to assent to the argument of the claimant's Counsel, the Government would not only pay them the value of the land and the wood presently on it, but would also pay them an additional sum by way of the capital of an annuity which would in truth constitute a second price of the subject sold. We do not think that this was

meant to be covered by the words of the ordinance, which give damage as the natural and immediate consequence of the prohibition. There is a small sum of interest given by the Commissioners upon the aforesaid sum of Rs 4500, on which it is enough to say we agree with the Commissioners upon this point. Messrs Desveaux having been compelled by the effect of the interdict on their forest to disburse a certain sum of money for fuel, it seems only fair to allow them interest on that sum as to the sum of Rs 10,000 which the proprietors of "Merlo" spent in buying, the servitude right of way through "Belle Rive" and "Hermitage," it was admitted by the learned Procureur General, that, if the Messrs Desveaux were not bound by the law of estoppel, that sum would be due as an item of claim to them, and as we have held that that law does not apply, we support the views of the Commissioners in this respect also.

Having thus gone over the various points which were urged in this somewhat important case, we conclude by confirming the report of the Commission.

## ASSIZE COURT

CHARGE OF AIDING AND ABETTING IN CRIME OF FORGERY.—VERDICT OF GUILTY.—MOTION IN ARREST OF JUDGMENT ON GROUND OF DUPLICITY OF INFORMATION AND COMMUNICATION WITH JURYMEN.

*In this case the prisoner was arraigned under an information for aiding and abetting in the crime of forgery. The information contained several counts; the jury having returned a verdict of guilty, the prisoner's counsel moved in arrest of judgment on two grounds: 1o. because it was averred in one of the Counts of the information that it was by means of a certain promise that the prisoner had investigated, and given instructions for the crime of forgery.*

*2o. because there had been communication with the jury.*

*On this latter ground, the prisoner's counsel moved that an enquiry may be made by the Court into the alleged facts of communication.*

held by the Court on the first ground :

1. *That duplicity in an information may be objected to by demurrer, but that it cannot be made the object of a motion in arrest of judgment.*

2. *That "instigating and giving instructions in a crime of forgery" are not a double offence, but only one offence, and that accordingly there was no duplicity in the information.*

Held on the second ground :

10. *That there was nothing before the Court which would tend to shew that there had been any improper communication with the jury.*

10. *That there was not even prima facie evidence that there had been an attempt to bribe the jury or to influence them in any way whatever, the Court could not order an enquiry asked for, and could not delay passing sentence on the prisoner.*

*The motion in arrest of judgment was therefore refused on the two grounds set forth by the prisoner's counsel.*

—  
QUEEN

versus

CAMAL BOUDOU.

—  
Before

His Honor E. J. LECLÉZIO,—Chief Judge

L. COX, — Her Majesty's Procureur and Advocate General, appearing for the Queen.

L. ROUILLARD AND T. L. JENKINS, — Counsel for Camal Boudou.

A. ROHAN AND E. CHAILLET,—Attorney for the same.

27th June 1884.

*The Chief Judge :* The motion in arrest of Judgment is here made on two grounds. The first ground being that of duplicity, or other-

wise that the indictment was doubtful "according to the words used in the English criminal procedure" because in some of the charges it was averred that it was by means of a certain promise that the prisoner had instigated and given instructions for the commission of the crime of Forgery.

In the first place I think it results pretty clearly from the decisions in the English Courts, which must be our guide here, that in criminal cases duplicity in an indictment may be objected to by demurrer but that it cannot be made the subject of a motion in arrest of judgment. Besides this I have no hesitation in saying that I do not find there is duplicity in the information, because it is the same offence which is charged ; for instance, I read from Archbold two cases in which it was ruled there was no duplicity and which have some similarity to the present case.

"Saying several overt acts in a count for high treason is not duplicity, because the charge consists of the compassing &c and the overt facts are merely evidences of it ; and the same as to conspiracy against that the defendant published and caused to be published a libel is not double for they are the same offence."

Instigating and giving instructions for the crime of forgery, are not in my opinion a double offence but only one offence. I therefore rule on the first point that there is no duplicity and refuse the motion which is made on that ground.

With regard to the second point I must say that after having read carefully the different authorities mentioned in Archbold, and those quoted by Mr Cox here to day, especially the case of *Regina v. Dixou* (which I think applies, although it was decided before the passing of our jury ordinance and the criminal procedure ordinance) I would perhaps have had no hesitation in refusing the motion under the circumstances of this case. However as the authority of *Regina v. Salomon*, a judgment delivered by Mr Justice Mure last year was quoted by both sides, before giving a decision which might appear to be opposed to a previous decision of one of my brother judges, I should like to confer with him and therefore I will reserve my decision on the second point until I have done so.



30th June 1884.

*The Chief Judge:* I have conferred with my brother Mr Justice Mure about the judgment he delivered in the case of Salomon, this case having been quoted by the defence, in favor of the motion made in order to obtain from the Court an inquiry into the alleged fact of communication of some jurymen with the public. From my conversation with Mr Justice Mure, it appears as my impression was after reading his judgment, that he gave no decision on the point of law.

The point of law raised here is that a motion in arrest of judgment should be grounded only, according to the rule laid down in Archbold, on some objection arising on the face of the record, and that no defect in the evidence or irregularity in the trial can be urged at this stage of the proceedings, Mr Justice Mure explained to me that the reason why he went into the fact in Salomon's case was that, although the Crown objected to his going into the facts (no objection was at first made upon the question of law) and did not admit anything, the Registrar an officer of the Court, having admitted at the very same moment in Court that he had allowed one of the jury men to go to his office in order to deposit some key which he had with him, he the learned judge thought it advisable as the permission had been given without the authority of the judge by an officer of the Court, and there had clearly been a separation of one of the jurymen from the rest of the jury pending the trial, that he should go into the facts in order to see to what extent that permission, which did not emanate from the judge himself had been used or abused by the jurymen. Here, certainly, the facts are very different; immediately after the verdict one of the Counsel for the prisoner, Mr Jenkins, rose and moved in arrest of Judgment on two grounds, on one of which I have already given my decision, and on the other viz: that there had been Communication with the jury, he asked for an adjournment till the next day in order to file the necessary affidavits to support that part of the motion, and as it was late in the day I told the parties that I would not pass sentence that day because I wanted to consider the sentence to give, I would make no objection to the adjournment of the case and would hear the arguments of Counsel on the point. The next day Mr Jenkins was ill, but the prisoner was represented by his other Counsel Mr Rouillard, and the case was again adjourned till 2 o'clock in order to allow Mr Rouillard to prepare him-

self upon the legal points to be argued in the case. At that time an affidavit by the attorney for the prisoner was read and filed and it runs in these terms. "I Elysée Chaillet, of Government street Port Louis, attorney at law make oath and say that I am the attorney of the prisoner that I have been informed and verily believe that certain of the Jurymen had communication during the trial, with one of the witnesses of the Crown whilst the examination of the said witnesses was not yet over. That I have been informed at half past eleven of the clock this day and verily believe that certain of the jurymen had during the trial of the cause communications with the general public".

The learned Procureur General maintained that it was too late to go into the question of knowing whether or not there had been communication between the jury and outsiders, and said that at all events the affidavit was insufficient, because it was not even *prima facie* evidence that there had been such a communication. The rule laid down in Archbold seems to be very broad indeed—it says, "No defect in the evidence or irregularity at the trial can be urged at this stage of the proceedings".

In this case however I would not like to give my decision upon that rule. I must state that I am not sufficiently informed as to the law in England as regards the application of that rule to cases like the present one, in order to go the length of saying that even if I had *prima facie* evidence before me that there had been an attempt at tampering with the jury or bribing them that I would refuse to hear evidence on such questions, but I need not give a broad decision upon that rule here, I am satisfied that the facts of this case, such as they are alleged, do not justify me in delaying passing sentence on the prisoner. In the first place I am not satisfied that the prisoner or his counsel did not know what they allege before verdict, for although the attorney declares that he was informed of the communication on Friday only after the adjournment of the case, we have this fact that on Thursday immediately after the verdict was given, Mr Jenkins rose up and said there had been communication between the jury and the public. I am not satisfied that before the verdict was given he did not know that such communication had taken place, and certainly if it be so, it was the duty of the counsel not to keep that fact to themselves. They should have told the Court of the fact and the Court

could have investigated into it and seen whether the communication was an innocent one or not. But there is more, there is no doubt, that in England the jury is not discharged when facts of communication are brought to the knowledge of the Court pending the trial, and are then investigated into, unless the Court is perfectly satisfied that the communication of the jury was of such a nature as to influence their verdict. Now here there is not even an attempt on the part of the attorney for the prisoner to say what was the nature of the communication. In the first place he merely says he has been informed. It would have been very easy to bring an affidavit of the person who informed him, the facts would have been stated, and the Court would have been able to discern whether the communication was of such a nature as to influence the verdict of the jury. This was not done. I have therefore nothing before me which would even tend to shew that there has been any improper communication, and as I have said it is not only on *prima facie* evidence of improper communication that the Court, even when the trial is going on, looks into the facts in order to see whether the communication was of such a nature as to affect the verdict of the jury. I therefore say that I would not be justified under such circumstances in delaying passing sentence on the prisoner. Let us suppose that instead of a verdict of conviction there had been a verdict of acquittal in this case, would the Crown upon an affidavit of the Crown Solicitor of the same nature as that which I have before me emanating from the attorney for the prisoner, have been entitled to ask for an enquiry into the facts with the view to obtain an order of the Court to avoid the verdict?—I have no hesitation in saying the Crown would not have been entitled to do so. The rule must be the same for the prisoner as for the Crown, and if the Crown could not upon a verdict for the prisoner, have asked the Court to enquire into an alleged communication, the nature of which is not even precised, the prisoner has no more rights than the Crown in the case of a verdict of conviction.

I must again state that I do not refuse the motion upon the broad rule which is laid down in Archbold, because as I have already explained, I am not at present satisfied that such rule should always apply without any exception—it may be that my decision would have been otherwise if I had had before me an affidavit of another nature, for instance, if I had an affidavit alleging that there had been

an attempt to bribe the jury, or to influence them in any way whatever.

But I have no affidavit of that sort and no *prima facie* evidence of that nature before me, and I must therefore refuse the motion in arrest of Judgment.

## SUPREME COURT

### CLAIM OF CERTAIN SHARES FRAUDULENTLY TRANSFERRED IN ANOTHER PERSON'S NAME.

*Circumstances under which the Court ruled that certain shares of the Mauritius Sugar Estates Company which had been fraudulently transferred by one of the defendants in his own name, were the plaintiff's property, and that they should be registered as such in the Company's books.*

BRONNER,—Plaintiff

versus

ALLY and ors,—Defendants

Before

His Honor EUGÈNE JULES LEOLÉZIO,—Chief Judge

and

His Honor JOHN ROUILLARD,—Acting Puisne Judge

G. GUIBERT,—Counsel for Plaintiff  
E. LEBLANC,—Attorney for the same

A. HUGUES,—Counsel for Defendants  
T. NICOLAS,—Attorney for the same

Record No. 22,104.

2nd July 1884.

In this case the original plaintiff Mrs. Bronner alleged that she was the *bonâ fide*

owner of 200 shares of the Mauritius Sugar Estates Company of the nominal value of Rs. 100 each; that she left for France in September 1882 carrying away with her those 200 shares; that, after she had left, her agent, Mr Boulé, applied to the manager of the Company for the dividend declared, and he was informed that 186 shares only figured in the books of the Company in the name of Mrs Bronner and that 14 shares Nos. 13437 to 13450 were registered in the name of James Lomas. The plaintiff further alleged that Lomas had been during some time prior to the 5th September 1882 enjoying her confidence, that she had entrusted to him the 14 shares above mentioned to be registered in her name, and that he induced her to believe that the transfer had been regularly entered by endorsing the 14 shares as her attorney.

It was also averred that Lomas, who was afterwards prosecuted for embezzlement at the request of the plaintiff, absconded from the Colony in June 1883, and had before leaving sworn an affidavit alleging that he was the owner of the 14 shares now claimed, and had mislaid them in April 1883 while removing from one house to another; that Arthur Aly alleging that he had purchased the 14 shares from Lomas, Boulé wrote to the plaintiff who sent from France the 14 shares, which she declared, are her property. The plaintiff asked the Court to decree that the alleged transfer made to Aly by Lomas is fraudulent, and that she is the exclusive owner of the 14 shares.

The defendant Arthur Aly was at first the sole real defendant called (besides the Mauritius Sugar Estates Company who filed a plea to abide by the decision of the Court) but after having partly heard the case the Court ordered that Lomas being present in the Colony be made a party to the cause.

The plea of Aly denied generally the facts alleged by the plaintiff, and averred that his purchase from Lomas was a bonâ fide one. The plea of Lomas was to the same effect.

Parole evidence was objected to, but the Court ruled that the plaintiff, holding in her possession the certificates of shares with an apparently regular endorsement, and the questions raised being fraudulent manoeuvres and transactions on the part of the defendants, oral evidence was admissible.

Several witnesses were heard on both sides and documents filed.

After a careful consideration of the evidence, we have come to the conclusion that plaintiff is the owner of the 14 shares which are the subject matter of this suit.

The shares are endorsed under the heading "Signature of the transferee" "*James Lomas* suivant pouvoir de Made Vve. Bronner." We have before us a power of attorney given by Mrs. Bronner to Lomas to sign the transfers of shares in the books of the Company, this power was left by Lomas in the hands of the manager of the Company when he began signing transfers on behalf of Mrs. Bronner. It is true that this power was at first made for the transfer of twenty shares on the 28th May 1881, but the following words were added "en outre accepter tous autres transferts de la dite Compagnie." Lomas now says that he did not add those words, and that each time he signed transfers for Mrs Bronner he had a special power, but this fact is denied by Mr Huguin, the present Secretary of the Mauritius Sugar Estates Company, who declared that the only power in virtue of which Lomas signed the transfer of 186 shares for Mrs Bronner is the one now in Court.

Lomas, to explain how Mrs Bronner was in possession of the shares, said that in June or July 1882, wanting money to buy shares of the Sebastopol Company, he went to see Mrs Bronner and offered the 14 shares of the Mauritius Sugar Estates Company to her for sale, that whilst she was making up her accounts to see whether she had sufficient funds to buy, he wrote the words "suivant pouvoir de Made. Vve. Bronner" under his own signature which already existed on the back of the shares since the time he had purchased the shares for himself, thinking that Mrs Bronner would give him a cheque together with a special power to sign the transfer, and that he would have completed the endorsement with a new signature of his name under those words at the time of the registration in the books and in the office of the company. He adds that Mrs. Bronner telling him to come the next day for an answer, he left the shares so endorsed by him in her possession, and that the next day Mrs. Bronner refusing to buy he did not claim back the shares, and forgot all about them until he was on the point of leaving Mauritius in June 1883. Those explanations are simply incredible. We cannot believe that a man who wanted to sell his shares in order to raise money to make a speculation, could have so easily left those shares in the possession of the person to whom

they had been proposed and who had refused to purchase them, and immediately afterwards forgotten what had become of them. In June 1883 when Lomas was prosecuted at the instance of Mrs. Bronner's agent for embezzlement of shares of the Central Rum Warehouse and was on the point of absconding from the Colony, he swears an affidavit in which he states that in April last (that is 1883) he removed all his moveable effects from one house to another, and that after such removal he has never seen the shares. This affidavit was made for the purpose of enabling Arthur Aly to obtain duplicate shares from the Company, and does not agree with the evidence given in Court by Lomas. The shares had left the Colony with Mrs. Bronner in September 1882 and could not be in possession of Lomas in April 1883. The affidavit is in our opinion as false as the reasons given in Court in order to explain the possession of Mrs. Bronner. Mrs. Bronner having died since the action was entered it has not been possible for the plaintiff to show exactly how she became the owner of the 14 shares in dispute, but the compromise signed by Lomas about the Central Rum Warehouse and his letter to Aly concerning Pierrot are proofs emanating from himself which show that he was not overscrupulous, and whatever criticisms may be addressed to Pierrot his deposition is certainly more trust worthy than that of Lomas, and when we read it with the entry on the back of the shares, the possession of the shares and the impossibility of Lomas to explain the entry and possession in a satisfactory manner, we think that the only reasonable conclusion to arrive at is that some time before her departure from Mauritius Lomas sold the 14 shares to Mrs. Bronner, left them with her and induced her to believe by means of the words "suivant pouvoir" written under his signature that he had really caused the transfer to be registered in her name in the books of the Company.

With regard to the endorsation it was stated that Mrs. Bronner could not have considered it as sufficient because the signature of the manager or secretary was not opposite the last words in the column headed "signature of the transferee" as is usually the case; but Mr. Hugnin has declared to us that there was no fixed rule as to the line in which the signature of the Secretary is written. This difference is not at all events of much importance in a case in which we are satisfied that the party who signed as transferee "suivant pouvoir" purposely omitted to complete the transfer by means of a regis-

tration in the books of the Company, with some fraudulent intent in his mind. We are therefore of the opinion that Lomas, if he ever was the *bona fide* holder of the 14 shares, had parted with the ownership thereof in favour of Mrs. Bronner in 1882, and that in June 1883 when he apparently sold them to Aly he had no rights in them.

For Aly it was argued that however fraudulent may have been the conduct of Lomas towards Mrs. Bronner he, Aly, purchased *bona fide* from Lomas and for valuable consideration.

The title which Aly holds is a declaration signed by Lomas on the 1st of June 1883 by which he acknowledges having sold to Aly the 14 shares and having received Rs 2240 as the price thereof, and he authorizes Aly to do the needful to obtain duplicate certificates of the shares, the original certificates having been mislaid. Aly applied to the Company and produced the affidavit of Lomas to which we have already alluded, but in the meantime the Company having been warned by Boulé of the fraud that had been practised on Mrs. Bronner, his principal, the duplicate shares were not delivered and the sale by Lomas to Aly was not registered in the books of the Company.

So the only title held by Aly at present is that document of the 1st June 1883 signed by Lomas—even if we were to admit that Aly was a *bona fide* purchaser it is doubtful whether he could invoke any preferential right here. Could Lomas have given him a good title at a time that he was no longer, as we have decided, the owner of the shares? Can that title, having remained incomplete on account of the refusal of the Company to register it in presence of the opposition lodged by the plaintiff, be of any avail to Aly? But we do not think it necessary to decide those points of law in this case; the guilty knowledge of Aly and his participation in the attempt of Lomas to defraud Mrs. Bronner resulting very clearly from the evidence.

In reality Aly does not prove in a satisfactory manner that he bought from Lomas; the declaration of the 1st of June 1883 signed by Lomas, to which we have referred, was at first made leaving the name of the purchaser in blank, the name of Arthur Aly was not inserted by Lomas; the sale is declared to have been made for Rs 2240 and Aly who invokes this paper as his title admits that the consideration mentioned is to a certain

point untrue—he says he has given only Rs 1350—when we look at his examination we see that he relates a story which destroys the value of the title he invokes. Barrister Jollivet whom he consulted told him he could not be safe until he had the duplicate certificates and the registration of his purchase in the books, and yet he buys on the 1st of June before attempting any of these formalities; and he buys knowing full well that Lomas was prosecuted for the embezzlement of shares of the Central Rum Warehouse and he pays before he gets the duplicates and the registration. Aly says he paid in notes although he had money in the bank but he adds, he had not much confidence in the banks and deposited only small sums. Aly also says that he was to resell the shares and to hand over to Lomas the difference, but this was merely a verbal agreement—this way of doing business is certainly not to be found in the ordinary course of affairs, and we cannot believe that a man, who appeared to us in the box to be very shrewd, would have acted as he did if there had been an honest transaction between him and Lomas. Pierrot has most solemnly declared that, in letters written by Aly to Lomas which were left with him by this latter and afterwards taken away, Aly had admitted that he Lomas was the owner of the shares; if this deposition stood alone we might perhaps have had some difficulty in accepting it as sufficient evidence against Aly, but when we read it with the deposition of Dr Pougnet to whom Aly merely said that he had advanced money on the shares, and also with the other facts of the case already alluded to by us, we have no hesitation in holding that Aly acted simply as the accomplice of Lomas in his attempt to defraud Mrs. Bronner.

The Judgment of the Court is that the 14 shares mentioned in the plaintiff's declaration are her property and that they should be registered as such in the books of the Company. The plaintiff's costs and those of the Mauritius Sugar Estates Company to be paid by the defendants.

### SUPREME COURT.

CLAIM OF Rs 3682 FOR REPAIRS TO A HULK HIRED BY DEFENDANTS, AND FOR LOSS OF ARTICLES LENT TO THEM.—ART. 632 CODE DE COMMERCE, 1841 CIVIL CODE.

*The defendants, by a written document, hired from the plaintiffs a hulk to which they agreed to effect certain repairs. The repairs were found to be insufficient and the plaintiffs agreed to perform certain additional repairs upon the verbal promise of the Defendants to pay for them.*

*In addition the plaintiffs lent the defendants certain articles such as anchors, pulleys &c. to the value of Rs 3032 but which did not form the subject of written contract.*

*During a hurricane the hulk and articles are alleged to have been lost.*

*On the plaintiff's proposing to call witnesses to prove repairs and loan, the defendant objected on the ground that under article 1341 of the Civil Code evidence was not admissible contre et outre the contents of a written document, but both parties acknowledged that there was an exception to this Rule in commercial matters.*

*Held that in hiring the hulk the defendants had acted commercially and that the Plaintiffs are entitled to lead evidence in proof of the claim. Further that the repairs effected by the plaintiff and the articles borrowed by the defendants formed part of the contract by which the hulk was hired and that both might be proved by witnesses.*

THE DRY DOCKS COMPANY, Plaintiffs

versus

SOOPRAYA MODELY & anor., Defendants

Before

His Honor ANDREW MURK,—Puisne Judge

and

His Honor JOHN ROUYLLARD—Acting Puisne Judge

P. L. CHASTELLIER,—Counsel for Plaintiffs  
A. J. COLIN,—Attorney for the same

W. NEWTON,—Counsel for Defendant  
H. BERTIN,—Attorney for the same

Record No. 22,270

4th July 1884.

In this action, which is one of three instituted by the plaintiffs against the same defendants, a claim of three thousand, six hundred and eighty two Rupees (Rs. 3682) is made : 1st for certain repairs to a hulk hired by the defendants from the plaintiffs on or about the twelfth of October 1883; 2o. for sundry articles alleged to have been lent by the plaintiffs to the defendants about the same time which articles were not restored to the plaintiffs in consequence of the hulk having been lost on the reefs at Black River during a hurricane which took place on the sixth day of December 1883.

The facts of the case may be shortly stated : Towards the end of last year, the ship "Larkspur" was capsized whilst entering the harbour of Port Louis. The ship, in the state in which it lay under water, was sold by public auction to the plaintiffs, who, soon after, hired from the Dry Docks Company the hulk "Mars" with the object of raising the sunk vessel. A written agreement was made between Mr. Lassime, as representing the Dry Docks Company, and the defendants, under date the twelfth October eighteen hundred and eighty three, and the plaintiffs bound themselves in their contract with the defendants, to perform to the hulk certain repairs which are, in the agreement above referred to described as "travaux de calfatage". It is now alleged that, those repairs having been found insufficient for the purpose for which the hulk "Mars" was hired, the plaintiffs performed to the hulk, at the request of defendants, certain other repairs and improvements, which the defendants bound themselves verbally to pay, over and above the price stipulated for in the original written contract. At the same time certain articles such as anchors, pulleys, chains, two winches &c. to the value of three thousand and thirty two Rupees (Rs 3032) are alleged to have been lent gratuitously by the plaintiffs to the defendants, at the request of the latter for the purpose of being used for raising the "Larkspur"; the agreement in the latter case having been verbal also. On the plaintiffs proposing to call witnesses in order to prove the repairs and the loan, as above stated, the Counsel for the defendants objected, on the ground that under article 1341 of the Civil Code, evidence was not admissible *contre et outre* the contents of a written document. But both parties were agreed that there was an exception to this rule in Commercial matters. So that it becomes necessary to determine,

in the first place, whether the convention which intervened between the parties was civil or commercial. The defendants further contended that a gratuitous loan (*commodat*) could not be an act "de commerce" even between traders and under no circumstances could be proved *de plano* by witnesses.

The plaintiffs founded their arguments mainly upon article 633 of the "Code de Commerce" which *inter alia* enacts, that all purchases of ships shall be "Actes de commerce" whilst the defendants laid great stress upon the following words of the article : "Pour la navigation intérieure et extérieure," from which it would apparently follow that, unless a ship has been purchased "pour la navigation," there is no "acte de commerce." The defendant further urged that the ship, in the state in which it lay under water, could not be properly called a "bâtiment pour la navigation intérieure et extérieure."

After careful consideration we have come to the opinion that, by purchasing the *Larkspur* the defendants have made an "acte de commerce". In the first place, the ship, which the defendants purchased, was not a wreck. It was a ship which, by some accident, had capsized near the entrance of the harbour and on being successfully raised it could have been navigated as before. The defendants bought it in order to raise it with the firm hope that they would do so, although, what they would eventually have done with it, is mere matter of conjecture, it is certain that, if they had not bought the ship for the purpose of navigating it, they would have sold it either whole, or even after breaking it to pieces.

In either case as a ship is moveable property, it would be an "acte de commerce."

It follows as a consequence that the agreement made with the Dry Docks Company in furtherance of the undertaking of the defendants which is an accessory to their main contract, is an "acte de commerce" and there cannot be an objection to the plaintiffs proving by oral evidence the alleged agreement as to repairs made at the request of the defendants.

We must in the next place examine that part of the dealings between the plaintiffs and the defendants which relates to the alleged loan of articles made for the apparent purposes of raising the *Larkspur*. That alleged loan, having been made, according to

the plaintiffs' averment, gratuitously, it was strongly urged by the defendants that it cannot constitute an "acte de commerce" and that therefore oral evidence is not admissible to prove that such a loan was made. Although no authority directly in point was cited by the defendants, it seems to the Court that the general principles, by which, according to articles 632 et seq. of the Code de Commerce, "actes de commerce" are distinguished from other transactions, are in favour of the defendants' contention. Apart from the cases specially enumerated in the articles above cited, and which do not include loans made gratuitously (Commodat), the main characteristic of an "acte de commerce" is buying (or hiring) for the purpose of selling (letting out for gain) and this definition cannot possibly include a gratuitous loan which, in the great majority of cases, is but an act of kindness from one party to the other.

If therefore the loan alleged to have been made by the plaintiffs to the defendants stood before us as an isolated transaction, the Court would have supported the plaintiffs' view, but after careful consideration of the facts, as represented to us, we have been led to inquire whether we were in presence of such a transaction as would have called for the strict interpretation of the principles above set forth, or whether the circumstances which have given rise to this special claim of the plaintiffs are not so intimately connected with the hiring and fitting out of the hulk *Mars* that they all form but one and the same transaction. Instead of having before us a distinct agreement for the hiring of the hulk, and another distinct agreement for the loan of certain articles, would not the transaction be represented in its true light, if it was held that the hulk *Mars* having been hired from the plaintiffs for valuable consideration and for a special purpose, the latter agreed to put on board, without charging any extra remuneration, certain articles which were apparently wanting to affect the purpose which the defendants had in view.

If so, is it not one and the same contract and would it be possible to disconnect one part of the transaction from the other, and hold that one was of a civil nature and the other commercial?

The view we take of the transaction between the parties is that the agreement for the hiring and fitting out of the *Mars* and the agreement characterized in the declaration as a loan, are but part of one contract, and as we have already ruled that the hiring

of the hulk *Mars* was a commercial act, which might be proveable by witnesses, it follows that the agreement for the gratuitous supply of the articles claimed in the plaintiffs' demand is also proveable by oral evidence. Costs reserved.

## SUPREME COURT

### APPLICATION FOR WRIT OF INJUNCTION TO PREVENT REMOVAL OF OYSTERS &c. FROM AN OYSTER BED PENDING DECISION OF PRINCIPAL ACTION.

*The plaintiff applies for a writ of injunction to prevent the defendant from removing oysters &c. from an arm of the sea leased to the defendant by plaintiff under the following circumstances:—*

*The arm of the sea in question had been leased to the plaintiff by Government for a term of 14 years. Four years before the expiration of the lease the plaintiff sub-leased the subject to the defendant and by a private deed, subsequent to the lease, the plaintiff's agent agreed to obtain a renewal of the lease from the Government and to pass to Mr Lagesse all the advantages which would result from that action of his for the whole time of the concession to be made to the same Mr Lagesse.*

*The lease was renewed by the Government for 7 years and was made over to Mr Lagesse. The renewal having expired Mrs Humbert obtained a second renewal, and Mr Lagesse claims that the renewed lease be again made over to him.*

*The plaintiff refuses to renew the lease and requests that pending the decision of the question whether she is bound to make over the renewed lease to Mr Lagesse a writ of injunction may issue to prevent Mr Lagesse from removing anything from the arm of the sea in question.*

*Writ granted, on the understanding that Mr Lagesse may remove the lime he has already made.*

HUMBERT,—Plaintiff

versus

LAGESSE, — Defendant

Before

**HIS HONOR ANDREW MURE**,—Puisne Judge

and

**HIS HONOR JOHN ROUILLARD**, Acting Puisne Judge

—

**Y. JOLLIVET**,—Counsel for Plaintiff  
**L. DE ST. PERN**,—Attorney for the same

**V. DELAFAYE**,—Counsel for Defendant  
**E. LEBLANC**,—Attorney for the same

—

*Interlocutory judgment on an application for a writ of injunction*

—

Record No. 22,472

4th July 1884.

*His Honor Mr Justice Mure* :—In this action it is sought that a writ of injunction should issue under the following circumstances :—

In the year 1863 Mrs Humbert acquired a lease from the Colonial Government of an arm of the sea in the neighbourhood of Poudre d'Or, in the district of Rivière du Rempart, which arm of the sea is said to extend to about 126 acres. That lease was to continue for the period of 14 years from the 1st of May 1863. During its continuance and in the year 1873, Mrs Humbert, acting through her agent, Mr Bigaignon, entered into an agreement, by a deed under private signature, with a Mr Lagesse, under which she bound herself to give him a sub-lease of this arm of the sea for 4 years, which would bring that sub-lease to a termination at the same time as her own principal lease.

Prior to the termination of the principal lease, and on the 15th July 1876, another deed under private signature was entered into between the same parties, that is, between the applicant and Mr Lagesse, under which Bigaignon, acting for Mrs Humbert, undertook to do every thing in his power to obtain from the Colonial Government a prolongation or renewal of the lease of this arm of the sea, and at the same time bound himself

to pass to Mr Lagesse all the advantages which would result from that action of his for the whole time of the concession to be made to the same Mr Lagesse. The lease was subsequently obtained by Mr Bigaignon from the Colonial Government; that lease was to last for the period of 7 years, and a sub-lease was granted to Mr Lagesse for that time. The principal lease and the sub-lease came to an end on the 30th April 1884.

There was no further contract between Mr Lagesse and Widow Humbert, but Mrs Humbert has again procured from the Colonial Government a renewal or continuance of this lease, and a question has arisen between the parties as to the effect of the clause in that private deed between Mr Bigaignon and Mr Lagesse, under which Mr Bigaignon bound himself to pass to Mr Lagesse all the advantages that were to result from his obtaining a lease, and to give him a lease during the continuance of the concession. Mrs Humbert refuses to renew the lease to Mr Lagesse, Mr Lagesse, standing on the clause in question, insists that he has an absolute right to have passed to him the advantages of the lease which Mrs Humbert has obtained from the Government.

Various points were urged before us; it was urged, for instance, that pending the decision of the Court on the question between the parties Mr Lagesse should be prohibited from removing any thing, whether lime, oysters, fish or any other produce from the place or from disposing of the same. It was said that the action of Lagesse was taken for the special purpose of obtaining the oysters and various other products of this basin during the season, and that the main object which he had in view was to delay the action which was raised by Mrs Humbert on the 6th of May, under which she asks the judgment of the Court in the first place, that Mr Lagesse should be ordered to quit and abandon this arm of the sea; in the second place, to pay a sum as rent, and in the third place to pay a sum of Rs 2000 as damages caused by his continuing in the occupation of the basin. To that Mr Lagesse has pleaded that the lease has been continued by virtue of the clause in that private deed between Bigaignon and himself, and that he has the right to all the advantages which Mrs Humbert has obtained from the Colonial Government.

This is a very important matter for the parties, although it does not involve a great sum and we have felt a little delicacy in



coming to a determination on the question, as there is in existence an action of damages, under which the plaintiff may obtain compensation for any wrong that would be done to him; but when we come to consider the mode in which the case is put before the Court, and that we have affidavits here in which it is asserted on the part of Mrs Humbert, that the produce of oysters from that Basin ought to be and is some 5000 or 6000 a day, whereas there is an affidavit from some one who knows the place on the side of Mr Lagesse, to the effect that there are only 800 oysters taken from it per day, looking to the mode in which the parties come before the Court and looking to the fact that this lease, according to the allegations of the plaintiff has expired, and that there is a principal action before the Court in which this question will be specially determined, and feeling a difficulty in forming an opinion on the question of law at the present moment, because our opinion might not be the opinion of the judges who will ultimately determine the matter, we feel bound to consider what the probabilities of the result of the action may be, and we cannot help thinking that the plaintiff has a strong *prima facie* case in her favor. We do not express any opinion on the question of law more than saying it seems to us that there is a *prima facie* case and we think it expedient that matters should remain without giving the defendant power to affect the subject, until the decision of the Court; when the Court has heard and decided the case there will then be an authoritative judgment on the rights of these parties, but as we think there is considerable danger of the rights of the plaintiff being seriously affected, because this fishery may be so worked as to leave a very small stock, we think we ought to allow this writ to issue as a temporary matter until the case is heard and decided by the Court; that is a very ordinary course to follow, and it is laid down in many elementary books in the law in England. We think that the plaintiff has established a strong *prima facie* case that the lease is at an end, and from what we have said it is not unlikely that if the basin is used by the defendants before the case is decided, the property will be diminished in value.

For these reasons we think it advisable that a provisional and temporary writ of injunction do issue, to endure until the principal case is heard and determined, but the writ will not affect any of the past transactions of the defendant, and especially will not affect the lime he has already made, and

which he will have the power to remove or sell. As this is a provisional and temporary writ we think that the costs should abide the result of the principal action.

## SUPREME COURT

APPLICATION FOR WRIT HABERE FACIAS POSSESSIONEM. — CANCELLATION OF LEASE ON ACCOUNT OF ALLEGED BREACH OF ITS CONDITIONS.

*This is an application for a writ of habere facias possessionem founded upon certain alleged breaches of the conditions of a lease of Government land originally made to Mr Grivot de Grandcourt, but now held by Mr Lucien Baz.*

*The lease provided that upon any violation of the conditions thereof the lease became ipso facto forfeited and cancelled, and it became lawful for the lessor to reenter into possession of the Estate with a writ of possession to be obtained from a Judge in Chambers.*

*The plaintiff alleged that the conditions of the lease had been violated inasmuch as certain trees forming part of four rows had disappeared, and had not been replaced; whereas it was expressly forbidden by the lease to cut them down, and in the event of their being blown down or otherwise injured, it was provided that they should be replaced "from time to time" by the lessee.*

*The plaintiff also alleged that the defendant held the lease from Mr Brue and that the latter had not replaced the trees he had cut down within the time directed by the lease.*

*The Court held that Baz cannot be made responsible of the alleged infractions of Brue or his predecessors but is merely bound to do the things which had to be performed in mere continuation of the obligations incurred by him with reference to the lease.*

*That the words "from time to time" are vague and do not determine within what time the missing trees of the four rows are to be replaced.*

*That the trees left unplanted by Brue had been planted by Baz before this action was entered.*

*in the application of Messrs Pilot and Bigaignon, which was opposed by the plaintiff, the Court allowed them to intervene as purchasers of a certain quantity of wood standing on the land.*

COLONIAL SECRETARY,—Plaintiff

versus

BAX,—Defendant

and

BIGAIGNON & PILOT,—Intervening parties

Before

His Honor E. J. LECLEZIO,—Chief Judge

His Honor J. ROUILLARD, Actg. Puisne Judge

and

His Honor F. C. WILLIAMS,—Puisne Judge

JOHN M<sup>c</sup> DOUGALL GIBSON—Substitute Procureur and Advocate General,—Counsel for Plaintiff

J. GUIBERT,—Attorney for the same

Hon. W. NEWTON—Counsel for Defendant

SAUZIER,—Attorney for the same

V. DELAFAYE,—Counsel for Intervening parties

H. BERTIN,—Attorney for the same

Record No. 22,185

9th July 1884

This is an application for a writ of *habere facias possessionem*, founded upon certain alleged breaches of the conditions of a lease of Government lands, known under the name of "Pas Géométriques", originally made to Grivot de Grandcourt, which lease is now held by Lucien Bax.

It appears from the documents before us that, on the 24th September 1855, one of the

portions of lands now held by Bax, measuring 270 acres, and described in the evidence as plot No. 2 was leased by the Government to Grivot de Grandcourt for a term of ten years, the said document of lease although made in 1857 was only registered in 1859.

On the 7th January 1861, another piece of land measuring 124 acres or thereabouts designated in the evidence as plot No. 1, was leased to the same Grivot de Grandcourt. These two leases were, on the 27th May 1868, by notarial deed made before Mr. Notary Geffroy, cancelled, and a new lease of the two plots of ground entered into for a period of twenty years, under certain conditions fully set forth in the notarial deed aforesaid.

This lease was, on the 24th February 1872, transferred to one Prosper Camil, who, in his turn, transferred it to Mr L. E. Brue on the 11th April 1872, both transfers being in due form accepted by the Government in terms of article 3rd of the deed of lease. On the 29th December 1875, the extent of the land leased was increased by a plot of ground, measuring 106 arpents, described in the course of the present proceedings as plot No. 3. On the 18th April 1882, the lease of the three plots of ground aforesaid was transferred by Brue to Bax, who, at once, entered into possession of the land, but the transfer was not duly accepted by the Government until the 1st February 1883, and the following entry was made on the original deed of lease :—"This lease is transferred to Mr Bax on the same conditions as previous leases. (Signed) G. G. Reid, Government Surveyor." Mr Bax in the same document accepted the transfer of the lease in the following words :—"I agree and accept the transfer of this lease subject to all conditions that have been imposed in previous leases and bind myself to observe them."

On the 29th June 1883, as apparently shewn by a document under private signatures, registered on the 3rd May 1884, Bax sold to Oscar Pilot and Gustave Bigaignon 2,857 cordes of wood to be made on the lands leased, the purchasers binding themselves to comply with the laws and usages regulating the leases of "Pas Géométriques."

Pilot and Bigaignon began cutting down filao trees in August 1883, but after they had been at work for some time, namely, on the 26th October 1883, they were stopped from felling trees by a writ of Injunction emanating from this Court, and at the same time

the present proceedings were instituted by the Government with the object of resuming possession of the land leased, on the ground that the conditions of the lease had been violated.

In the present proceedings Messrs Pilot and Bigaignon have applied to intervene. To their request the Crown has objected on two grounds:—1o. Because the sale of filao to be cut down by Pilot and Bigaignon not having been made with the consent and permission of Government in terms of article 3rd of the original deed of lease, is in itself a breach of the conditions of the lease, and at all events, cannot be recognized by the Government. 2o. Because the deed of lease, having been registered on the 3rd May 1884, has a date certain as to Government at that date only.

The first objection in the opinion of the Court is not borne out by the terms of article 3rd of the deed of lease above referred to. In that article it is indeed stated that the lessee shall not assign the whole or any part of his interest under the lease without the previous permission of the Governor of Mauritius, but this obviously refers to the transfers of the lease, or of any portion of the land leased. It cannot reasonably extend to the disposal of the produce of the soil, especially when the disposal of that produce is one of the objects for which the lease was made. Planting trees is the main condition imposed on the lessee by the Government, but as a compensation, the trees are to be the property of the lessee, under certain restrictions as to the time of cutting. What is there in the deed of lease to prevent the lessee from selling any portion of the wood which he has the right of felling? It is admitted by the Government that Bax could have cut down the trees and then that he could have sold them. Bax could also have contracted with a third party to cut down the trees for him. What difference can it really make, that Pilot and Bigaignon, by the terms of their contract with Bax, agreed to cut down the filao trees themselves?

To the second objection, it is, we think, a satisfactory answer that in the proceedings under the writ of Injunction issued at the request of Government, Pilot and Bigaignon took an active part and founded their right of intervention on the very document which they now produce. This in our opinion establishes conclusively the right of Pilot and Bigaignon to intervene in the present proceedings.

The Government of Mauritius claims a writ of possession, enabling it to re-enter the lands leased to Bax, in virtue of article 1st of the deed of lease originally made to Bax de Grandcourt, which runs as follows:—

"..... In case the lessee shall not have, within the delay mentioned in article 1st of these presents, replaced the trees cut down by him, or in case the lessee cuts in any year, more than one sixth of the trees planted on the lands leased, or in case any other clause of the present contract be violated by the said lessee then the present lease shall be and become *ipso facto* forfeited and cancelled and it shall be lawful for the lessor to re-enter the premises hereby demised and repossess his former estate therein, without any further formalities than a writ of possession to be obtained from a Judge of the Supreme Court sitting in Chambers upon an affidavit of a breach of contract, on the part of the lessee."

The defendants do not deny that, upon the violation by the lessees of any of the conditions of the deed of lease, it becomes *de plano* cancelled and that the Government is entitled to obtain a writ of possession, but they urge that the acceptance by the Government of the transfer of the lease to them must be construed as a virtual declaration that the lease is still in existence and as an implied waiver of all exceptions which might have been taken at the time as to the mode in which the conditions of the lease have been fulfilled by the previous lessees. The question before the Court is therefore in the first place whether there has been any violation of the conditions of the lease, and in the second place whether the acceptance by the Government of the transfer by Grivot to Camil and then by Camil to Brue and by Brue to Bax can have affected the right of the Government to claim the cancellation of the lease.

The first ground of complaint by Government is that there has been a violation of article 4th of the original lease, which stipulates that "the lessee will not fell or permit to be felled or otherwise injure any of the four rows of filao and will from time to time during the continuance of the present lease replace with fresh trees any trees of such four rows which may have been blown down or otherwise injured."

With regard to the present conditions of the four rows of filao trees which in terms of the lease were to be kept up along the

ore, through the whole length of the "Pas Géométriques" the Court sees no reason for not relying on the description given by Messrs Brousse and Brown, who were specially deputed by the Government for the purpose of inspecting them. It results from the evidence of these two witnesses that, in these lines of filaos trees, there are occasional gaps, some of them of some extent, whilst here and there trees are wanting, the cause of their destruction being unknown. They also found a few stumps, showing that trees had been cut down; but it does not appear whether the trees so cut down were dead or alive when they were felled. As an explanation of the disappearance of the trees the Court has the evidence of Mr Brue, a witness for the Crown, who swears that he always did his best to keep up the four rows of filaos as per agreement, but that for several reasons which he pointed out, it was very difficult to do so. One thing is certain. There is no evidence that either Brue or after him Bax, ever cut down one of these trees or that they ever gave authority to that effect and it may well be that, as suggested by Brue, they were pilfered by fishermen. Now the missing trees were to be replaced "from time to time" was it every year, or every second or third year? It is difficult, under such a vague expression, to define when a lessee of lands held under such conditions would be not fulfilling his contract, but any how, if some one was at fault, it was Mr Brue. It can hardly be said that Bax, who was accepted as transferee of the lease by Government in February 1883, could in the few months which elapsed before the present proceedings were taken have incurred the heavy penalty of losing the benefit of the lease for not having replaced the whole of the four rows in the condition in which in the opinion of Government, they ought to have been.

But the gaps about which so much has been said in the course of this enquiry, are not of recent date. From Mr Brown's evidence they must have existed for years, and they were quite apparent. Can the Government now turn against Bax and say:—It is true, filaos have been missing in the four rows for five or ten years or even more and we have not taken any steps against Brue, but now, after we have recognized the transfer of the lease made to you and in fact accepted you as our lessee we mean to enforce the clause of the contract, and we maintain that the contract of lease is now cancelled?

In the opinion of the Court the Govern-

ment cannot do so; by accepting Bax as their lessee, the Government must be held to have waived all action with reference to the irregularities alleged to have been committed by Brue or his predecessors for we have no fixed date as to the time at which the gaps first occurred in the four rows of filaos above referred to. These irregularities we must presume to have been fully known to the Government, as any one could have discovered them. It is meant that Bax, the present lessee, is not bound to comply with the stipulations of the lease with reference to the four rows, but he must be given reasonable time to do this and the opinion of the Court is that he had not yet had that reasonable time when the present proceedings were entered.

The reasons above given are those which guided the Court when it ruled at the outset of the case that it was needless to adduce evidence to prove that in violation of article 5th of the deed of lease, all the unplanted parts of the lands leased in 1868 to Grivot de Grancourt were not planted within eighteen months of the signing of the deed of lease. If it is true that Grivot de Grancourt did not comply with this condition of the lease it is none the less clear to the Court that the non fulfilment of this condition, cannot be invoked as a cause of nullity against Bax, after the lapse of fifteen years, when the Government by its continued silence, has led all parties concerned to believe that it was satisfied as to the fulfilment of that part of the contract.

The third ground urged by the Government for obtaining the cancellation of the lease, is an alleged infringement of article 7th of the deed of lease, which runs as follows:

"The lessees shall have the right to cut down and to dispose every year, of one sixth only of all the trees planted upon the Land... under the condition that he shall replace with fresh filaos before the end of the month of June in the following year all the trees he may have cut down."

The contention of the Government is that there has been a violation of the contract by Brue in former years, by not replacing the trees which he had cut down, and as evidence of this infraction of the clauses of the deed of lease, the attention of the Court was called to the great number of "repousses" which were found by Messrs. Brousse and Brown and which clearly indicate that, instead of

replanting the trees after they had been cut down, Bax's predecessors simply allowed the stumps to give shoots again. On the other hand, the learned Counsel for the defendants argued at some length that by allowing the stumps to grow again, Bax's predecessors were complying if not with the letter, at all events with the spirits of the agreement between the Government and the lessees of the land.

The Court cannot entertain this view; by "replacing" a tree which has been cut down is meant planting another tree in lieu of one which has been cut down or destroyed. It is clear therefore that, so far as Brue or his predecessors are concerned, there has been an infringement of the conditions of the lease, but, with reference to Bax the case assumes a peculiar aspect. In taking possession of the land what was he to do with the "reposses" left by his predecessors some of which were of great size; was he to destroy them and plant other trees before he could cut down any trees himself? Or was he to consider them virtually as trees? The question as to these "reposses" and also as to the gaps of old standing which were found here and there amongst the filao trees in the three plots of ground, is the same that arose with reference to the two previous ground for cancellation of the lease—Brue, or his predecessors, by not complying with the terms of the agreement with the Government, undoubtedly laid themselves open to an action in cancellation of the lease. But, for successive years, the Government allowed matters to remain in that condition. It did not complain against Brue. Brue was allowed to transfer his contract to another person, and that person was accepted as lessee by the Government. Bax cannot now be made answerable for these past alleged infractions of Brue or of his predecessors. But the Court holds that Bax, as transferee of Brue, was bound to do the things which had to be performed in mere continuation of the obligations incurred by Brue with reference to the lease. For instance, there being a clause in the deed of lease to the effect that the lessee was to replace before the end of June in any one year, the trees cut down in the preceding year, the fact of the lease being in the beginning of the year 1882 transferred to Bax, did not exonerate him from the obligation of replacing the trees, if any had been cut down during the course of the preceding year.

The question for the consideration of the

Court is whether Bax has duly complied with this last condition and this renders it necessary to ascertain from the evidence produced on this point, which in many parts is somewhat obscure, the facts on which the Court may safely proceed to judgment.

On one point however, the Court is satisfied namely: that between the 18th April 1882, and the month of August 1882 when Pilot and Bigaignon began cutting down trees, there was not any systematic felling of trees by Bax. He admits having taken a certain number of trees for the wants of his Estate and having even allowed Faduilhe to take a few, but the Crown did not urge this as a ground of cancellation. According to Faduilhe's evidence, Brue cut down about twenty five acres of filao trees in the course of 1881, but without imputing for one moment to this witness any idea of attempting to mislead the Court, his statements cannot be received without corroboration.

In the first place, as to these twenty five acres. They never were measured by a competent person. Then as to a more important fact, this gentleman made a mistake when he said that he saw a certain extent of wood being cut down by Bax in 1882, whilst it appears, not only from the evidence of Bax and Lecomte, but also from that of an Indian who had been in charge of the filao trees after the sale made to Bax and who was called as witness by the Government, that, with the exception of trees which Lecomte caused some workmen to cut down here and there, there had been no clearing land of trees by Bax, so that the fact spoken to by Faduilhe must be attributed to Brue and not to Bax. But, as to the extent of land actually cleared during the period immediately preceding the transfer to Bax, Brue, another witness called by the Government instead of twenty five acres, estimates it at from four to six acres, which were cut down between November 1881 and March 1882—and this is, in the opinion of the Court, the evidence upon which it has to proceed.

The serious point which remains for us now to consider, is whether Bax acting in the place of Brue has since April 1882 violated the lease in the matter of replanting under the conditions of clause 7.

Let us first take the view most favourable to the contention of the Government namely: that the ratification in February 1883 of the private agreement of April 1882, rendered

instead of Brue, personally responsible to Government for all laches that occurred since date of the private agreement in April 2. The position of affairs was then according to Brue, who was a witness for the crown, certain trees which he had cut down in 1881 had to be replanted by Bax before the end of June 1882, or within three months of private transfer, and certain other trees, which Brue had cut down in the first three months of 1882, had to be replanted by Bax before the end of June 1883. If the responsibility of Bax begins at the date of the private transfer, it follows that the defendant would be in default with respect to the trees which may have been cut down in 1881 and which were not replanted before the 30th June 1882. The defendant does not pretend to have planted anything up to June 30th 1882 or indeed 1882 at all. On the contrary, he says that he cut down from 40 to 50 trees in the course of 1882. On this point, however we have already remarked that, if the cutting down of these 40 or 50 trees constituted an infraction, it was not insisted upon by the Government. Now if we are to believe Mr Lecomte, and we do not wish to disbelieve him, the second obligation as to the trees cut down in 1882, and to be replanted by June 30th 1883, was fulfilled and more than fulfilled, for in February 1883 he declared, upon reference to his note book, that he planted 6000 filaoe trees, while Brue's evidence in cross-examination was that he left at the very most 6 acres, at 350 trees per acre, or 2100 trees, to be replanted in all. Thus, if we are to believe these two witnesses, one for the plaintiff and one for the defendants, it seems certain that Brue's cuttings, both of 1881 and 1882, were ultimately made good by the defendant; those of 1882 (to which we may add his own cutting of 40 to 50 trees in 1882) within the time prescribed by the lease, but those of 1881, after that time or nearly eight months subsequent to June 30th 1882. Having decided that the plaintiff has failed upon the other ground raised to make out an adequate case for the cancellation of the lease, we have concentrated our attention upon the point whether this particular infraction which Bax is alleged by the Government to have committed is to have the effect sought by the plaintiff, an effect entailing upon the defendant the most serious consequences of pecuniary loss. We have decided that it ought not so to operate, and for two principal reasons:

First, because, whilst there is reason for supposing that trees were cut down in 1881,

and not replanted before 31 June 1882, we are without any certain evidence as to the extent of the alleged infraction, and we think that, in such a grave matter as the issue of this writ, involving the cancellation of a lease, we ought to have evidence more precise and definite than that supplied by the Crown; if it is really true that trees were cut down in 1881, and not replanted by Bax before 30th June 1882, how many were they? Were there many cut down, or only such a small number as would have rendered the application for this writ morally impossible? Upon this question the evidence is vague and incomplete. We have in fact no definite information and we therefore think that there is no sufficient ground for the issue of the writ now.

Secondly, The Defendant Bax did ultimately, if we are to believe Lecomte's evidence, atone for the two months laches by his exclusive plantings of February 1883, the first month, we may remark, of his tenure of the lease under the express assent of the Government. Upon this point, if the contention of the Government before us to day is right, it would have been open to the plaintiff's to commence their action against the defendants immediately after their sanction of the transfer to Bax, and the defendants are surely not more in the wrong now than they would have been then, because, immediately after that sanction of the transfer, they did all that ought to have been done before.

There would be much ground, it seems to us, in the contention that the Government condoned the delay which took place in replanting between April and June 1882, by sanctioning the transfer without any reference to that delay in February 1883, and that, at all events the delay, having been atoned for, if not condoned, immediately after the sanction of the transfer, forms a poor ground now for the lease's surrender. By June 30th 1883, if Lecomte is worthy of credit as a sworn witness, he had placed himself in the right with respect to the number of trees replanted, although he could not do so as to the time for their replanting.

To recapitulate: We must refuse the issue of the writ asked for; in the first place, because we are without certain evidence as to the extent of the violation complained of; and in the second place because, whatever its extent it was subsequently if not condoned at least atoned for, so far as replanting after the specified time could atone for it,

long before this action was brought. In fact we find that the technical violation complained of was perpetrated seven months before Government accepted Bax as transferee of the lease, and this action was commenced by the Government as many months at least after the technical violation had been atoned for by subsequent replanting.

Evidence was also led to show that Pilot and Bigaignon had cut down more than one sixth of the whole number of trees existing on the land leased. Objection was raised by the counsel for the respondents to the Court taking this point into consideration, inasmuch as it was not raised in the affidavits which constitute the ground work of this action, although strange to say in the written statement made by Bax, which forms part of the present proceedings, he enters into the question whether one sixth of the filao trees has been cut down. It may perhaps be more satisfactory to decide the matter of fact itself, and we are of opinion that the figures given by Messrs Brown and Brousse show conclusively that Messrs Pilot and Bigaignon were within the number of trees which they were allowed to cut down. From one of the statements prepared by Mr Brown, which we consider is the one upon which we should proceed in this case, these gentlemen found on the three plots of ground, 51705 trees including the trees fresh cut, and of these the number was 6230. There was therefore a clear margin of 2331 trees to reach the proportion allowed by contract.

The writ prayed for is therefore refused with costs. The costs of the intervening parties to be borne by themselves.

### SUPREME COURT

**LIQUIDATION OF ORIENTAL BANK.—CLAIM OF MONEY DEPOSITED IN BRANCH BANK IN THIS COLONY.—HELD THAT ALL FUNDS OF BANK ARE VESTED IN LIQUIDATOR APPOINTED IN ENGLAND.**

*In this case the plaintiff seeks to recover from the Official liquidator of the Oriental Bank Company the sum of Rs 16,650.80 c. being the amount in principal and interest of two sums deposited in the Bank in Mau-*

*ritius by the plaintiff, and stipulated to receipts for the money to be repayable in Mauritius.*

*The defendants pleaded that the winding up of the Oriental Bank Corporation having been decided upon under English Statute known as the Companies Acts of 1862, and 1867, the high Court of Chancery Division London had appointed T. A. Welton provisional official liquidator, and that in consequence the plaintiff is not entitled to bring the present action; that the only remedy is to prove his claim in due time in accordance with the provisions of the Acts, and at all events the present action ought to be stayed.*

*Held that an order, given by the Court of the principal domicile of the trader who has stopped his payments, cannot be ignored by the Court within whose jurisdiction such trader has a branch firm, and that, on the contrary, effect should be given to it when both Courts are under the same sovereignty.*

*Action stayed, until otherwise ordered by the Court.*

D'ESPAGNAC,—Plaintiff

versus

ORIENTAL BANK CORPORATION,—  
Defendants

Before

His Honor EUGÈNE JULES LECLÉRIO,—Chief Judge

His Honor ANDREW MURE,—Puisne Judge

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—  
Puisne Judge

L. ROUILLARD,—Counsel for Plaintiff  
A. LHOSTE,—Attorney for the same

Hon. W. NEWTON,—Counsel for Defendants  
E. DUVIVIER,—Attorney for the same

**P. L. CHASTELLIER**, — Counsel for 1o. The Mauritian Marine; 2o. The Colonial Maritime and 3o. The Mauritius Fire Insurance Companies

**J. BOUCHET**, — Attorney for the same

Record No. 22,457

JUDGMENT OF HIS HONOR F. C. WILLIAMS

16th July 1884.

This is a question affecting the disposition of assets in the Colonial Branch of a Banking Corporation which is in course of winding up under an order of the English Court of Bankruptcy, a provisional liquidator having been duly appointed. It is a case in which I think that we are justified in basing our judgment upon English precedents, particularly if we find them in accordance with well established principles of commercial jurisprudence and of private international law, my learned colleagues have touched upon these points which were fully noticed in the arguments and after hearing the authorities cited, I find no difficulty, in reference to the particular question at issue, in endorsing the dictum of the learned Scotch Judge in the leadings case of *Strother vs Read*: "The interests of Commerce, he said in the course of elaborate Judgment "as well as the regard which all nations ought to pay to the principles of general law, point out the necessity of adopting in cases of Bankruptcy," and this as regards the effects of the winding up order and the appointment of a liquidator upon the assets is, I think on a par with a case of Bankruptcy ~~the~~ *one* uniform rule and nothing can be more expedient than that we should follow out the principle already noticed of immoveable effects being subject to the disposition of that law which binds the person of their owner. It is perfectly fair and equal that when an English merchant who happens to have personal effects here (in Scotland,) becomes bankrupt, the law of his own country should be allowed to take his whole effects, wherever situate, into its custody for the purpose of equal distribution among his creditors according to the rules of the English law, while we are permitted in the case of Scot's bankruptcy, to do exactly the same thing in England."

In the present case, the plaintiff made the deposits for which he sues, with the branch establishment of a Company domiciled as he was well aware in England.

There is no question but that the proceedings under which that Company is virtually bankrupt to-day, were properly commenced in England as the place of its chief-domicile. A French jurist (*Pardessus droit Commercial* part. 6 Title 1 sec. 1 No. 1094) has well written on this point "L'état de faillite frappant l'universalité de la fortune du commerçant, il est évident que le seul tribunal compétent pour en connaître est celui de son domicile. Ainsi, lorsqu'un commerçant ou une société a plusieurs comptoirs ou maisons, la connaissance de sa faillite n'est point attribuée par préférence au tribunal dans lequel est situé l'établissement dont la cessation de paiement a la première éveillé l'attention mais bien à celui du domicile."

The question, then is whether, the Supreme Court of the English Colony of Mauritius should or should not recognize the authority of the English Court in the matter of this liquidation and whether we should or should not regard the winding up order made in England as protecting the personal assets of the Bankrupt Estate here against local law suits instituted by individual creditors of the Estate, and as vesting those assets in the liquidator appointed by the Court in trust for the general body of creditors.

It was contended, and with truth for the plaintiff, that the English winding up order was made under a statute which has no special application to this Colony, but the question of Bankruptcy or its equivalent, is one of fact, upon which we can entertain no moral doubt in the present case. Now, if there had been an actual adjudication of Bankruptcy in England, the assignees would at one time have had a statutory title to the personal Estate and effects of the Bankruptcy Company here or in any British Colony, under 1 and 2 W. 4 C. 56 85 & 5, 26, 27; and even to the real Estate "in any of the dominions, plantations or colonies belonging to His Majesty without deed of conveyance," upon fulfilment of certain conditions of registration. The question here, however, is of personal property and in respect to that, the statute just quoted, and repealed by the English bankruptcy act of 1869, was probably the outcome of a century of growing feeling in English Courts



of law in favor of the universality of Bankruptcy and the international effect of bankrupt laws, and of the extra territorial operation of the title of the Curator or Assignee. Perhaps the first expression of this feeling was Lord Talbot's opinion given in 1723 that "although the statutes of Bankruptcy did not extend to the plantations, yet that the personal property of an English Bankrupt in the plantations passed to the assignees." In 1764, in the case of *Solomon v. Ross*, Mr Justice Bathurst, sitting for Lord Chancellor Northington, pronounced a judgment giving effect to the Bankrupt laws of Holland, a principle which was again followed in Chancery in the case of *Jollet v. Deponthien* before Lord Chancellor Camden in 1769. Just prior to this, a decision of the Privy Council in *Richards v. Hudson*, an appeal from the Court of Chancery of Virginia, then an English Colony, established the prior rights of assignees under an English Bankruptcy against creditors of the Bankrupt in Virginia.

The Scotch Court of Session followed this precedent as to English assignees and personal property in Scotland in the case of Captain Wilson, and subsequently in that of *Strotter v. Read*, the judgment in which has already been quoted, and the Court of Chancery of Ireland in 1763 in *Grattan's* case adopted a similar view and ordered a creditor who had obtained an attachment in Ireland against a debt due there to the bankrupt, to refund the money obtained under the attachment to the English assignees.

"So generally was this doctrine received as a rule" says Burge in his *Commentaries* on the conflict of laws that Lord Tharlow is reported to have said "that he had no idea of any country refusing to take notice of the rights of assignees under English laws, and he believed every country on earth would do it, besides the Courts in America." Lord Loughborough in the case of *Sill vs. Worwick*, in which the same doctrine was upheld by the Court of Common Pleas, entered every fully into the general doctrine. "Personal property" he said "being governed by the law of the country which governs the person of the owner, the condition of a bankrupt by the law of England is that the law upon the act of Bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees who apply that property to the just

"purpose of the equal payment of his debts. If the Bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but that it will give effect to the title of the assignees. The determinations of the Courts of this country have been uniform to admit the title of foreign assignees."

Apart from the reversed statutory authority (1 and 2 W. 4 C. 56 § 25 27) to which I have referred as embodying the principle of these decisions, that principle has been re-affirmed by numerous rulings from the days of *Sill v. Worwick* and *Strotter v. Read* even to the application made in the Supreme Court of Victoria the other day in the case of this very Banking Corporation, in which case if I understand it aright, the Presiding Judge intimated that even if there were a separate liquidation in the Colony, the Colonial assets must go into the general fund for common distribution without preference to local creditors, while Mr. Justice Kay in the Chancery division of the High Court of Justice in England, in the case of a Bankrupt Company domiciled in New Zealand appears on similar grounds to have objected altogether to a separate liquidation in the English Court. Broadly stated, the principal seems to be that local Courts will not afford a preference as to personal assets in a locality to local creditors as against assignees representing the general body of creditors in bankruptcy proceedings commenced and carried on as they must be at the Court of the Bankrupt's chief domicile. I am fully of opinion, regarding the liquidation under a winding up order as equivalent to bankruptcy so far as the protection of assets vesting in the liquidator is concerned, that the claim before us now, falls within the scope of this most just and wholesome doctrine, a doctrine which we may hope some day to find of universal adoption. It is already incorporated in English text books. "According to the Law of England and of almost every other country (says Smith in his *Mercantile Law*, 8th Edition) personal property has no locality but is subject to the law which governs the person of the owner. It follows that unless there be a positive law there to prevent it, the bankrupt's personal property in foreign countries passes to his trustees." There is certainly no law here to prevent it, even were Mauritius, in respect to England a "foreign country" which it is not, and if the Code Civil contained an explicit provi-

on upon this point, it could not be seriously intended that the Code Civil places an inhabitant of Mauritius in the same relation England as an inhabitant of France. It seems to me that this case falling within the law applicable to English Bankruptcy, the personal property of the defendant company situated here, is protected by the order of the English Court and vests in trust for the general body of creditors in the receiver or trustee appointed under the Court's authority, who is in the same position as the assignee in the cases quoted.

But as the proceedings in England of which we can take judicial cognizance have been only provisional our best course is to accede to the defendants' prayer for stay of the plaintiff's action.

#### JUDGMENT OF HIS HONOR A. MURE

16th July 1884

In this case the plaintiff sues the Provisional Official Liquidator of the Oriental Bank Corporation, represented here by his two mandatories Messrs Trail & Don, and so far as need be Mr Ferguson, the late manager of the said Oriental Bank in Mauritius, and alleges that the Oriental Bank is due to him the sum of Rs 16,650.80 c. consisting of two sums of Rs 7,500 and Rs 8,720, with interest thereon contained in two receipts the first dated 30th May 1883, repayable in one year and the latter dated 3rd December 1883 and repayable at six months, both receipts bearing to be granted at Mauritius and both being repayable here. In each case notice of repayment was given at the time of deposit and the above sums became respectively payable on 30th May and 1st June 1884.

The plaintiff asks the decree of the Court for the sums above mentioned with interest that had accrued thereon before the raising of the action and with interest at 9 per o/o on the whole sums due from the date of the service of the action. It will be observed from the very form of this action, that the plaintiff recognizes the fact that the Oriental Bank is in liquidation. That Bank and the provisional liquidator have filed a plea to the effect that the liquidation of the Oriental Bank having been taken under the Company's Acts of 1862 and 1867, the Court of Chancery has

appointed a provisional official liquidator of the Bank, and that in consequence the plaintiff is not entitled to bring the present action, but his only remedy is to prove his claim in due time under the provisions of the acts of 1862 and 1867 and that in any event the present action ought to be stayed.

The question of law raised by the above plea having been very ably argued by the Counsel engaged, it now falls to the Court to determine the very important case submitted. It will be seen that the claim of the plaintiff is a simple claim of debt under a contract which is evidenced by the receipt before mentioned, from which it appears that the Contract was both made and was to be fulfilled in Mauritius. In all ordinary circumstances the plaintiff is entitled to come to this Court and ask a decree from it in the terms proposed. The obligation of the Bank arising out of the Contract, would, in the case supposed, lead to a judgment to be delivered in the place where the obligation to repay fell to be fulfilled. In all contracts the important question, when the jurisdiction of the Court is to be considered, is the place where the party intended the Contract to be worked out. That place becomes the forum of the obligation. Usually the only doubt which arises in such cases is the difficulty of fixing the place of fulfilment. In the present instance no such doubt arises, there being an express mention of the place where this sum of money is to be paid. It was therefore the direct intention of the parties to fix Mauritius as the place of payment—so far the case of the plaintiff is clear and undoubted.

But the plaintiff's action presupposes a suspension of payment on the part of the debtor, and an inability to pay the debt on demand, for he tells us that he seeks a decree in order to execute it against the property of the Bank in Mauritius, because it has failed and is in liquidation. It is apparent that if he succeeds every other creditor will take the same steps, executions will become numerous against the same property and as by our law all the property of a debtor is the common pledge of his creditor, it is clear that the Estate would be torn by conflicting claims, and that the hope of payment would not be realized. A complete execution of the judgment of debt that may be pronounced is therefore an impossibility. And all that can be expected is a partial execution of the judgment and only in so far as all the claims of the body of creditors permits of that execution. It follows that there must be a comparison of the various

claims, privileged and unprivileged against the Estate and there would be a number of creditors whose claims fall to be adjusted. This process may be repeated in every place, where the Bank has a domicile of contract and its assets would be torn by conflicting claims, and burdened with heavy expenses of execution. From the conflict of laws which would arise, the adjustment of claims having to be made and the assets distributed rateably, it is apparent that that can be done only at one place, and the question arises which is the true place at which this operation can be made? Jurists have suggested various solutions in answer to this difficulty, some have maintained that there may be a plurality of Bankruptcies and that there may be a winding up in each place where there is property, but the great weight of authority is in favor of selecting the domicile of the debtor as the place where the claims are to be made and the assets distributed. This is the only means by which justice can be done to the various creditors and their claims fairly considered and a rateable distribution of the assets made. Besides the works of Story and Phillimore quoted at the Bar to that effect, we may add the authority of the great writer on international law Von Sarigny who, in discussing the effect of Bankruptcy on the rights of creditors says: "As the Bankruptcy has in view an adjustment of the claims of a number of creditors, it is possible only at one place, namely, at the domicile of the debtor, so that the special forum of the obligation is here displaced by the general personal forum." The great principle which has been established as guiding the decisions of the great majority of all countries is that the personal estate as an entirety is held to be situated there where the bankrupt has his domicile and that it is to be administered in Bankruptcy according to the rules of the law of that country just as if locally situated within it. The result is that an adjudication in bankruptcy or other similar executory act of the law, divests the Bankrupt of his whole personal estate and transfers to the assignee or trustee or syndic under the act, all moveable Estate of the Bankrupt wheresoever situated, so that all preferences attempted to be made, may be defeated, all claims may be decided upon, and the assets finally distributed in the place of his general domicile. These principles have been laid down both by the English and Scotch Courts of Law. In an early case *Strother v. Read* July 1803 reported in Morrison's Collections of the decisions *voce forum competens* Appendix No. 4, it was held on the principles of international law that the assignee under an

English Commission of Bankruptcy was preferable to debts due in Scotland to the Bankrupt, in competition with a creditor who subsequently to its date obtained decrees and attached these debts and it was then observed on the bench that although execution in making the right effectual must be according to the forum of the country where the debts are situated, yet in a competition the right itself and the transfer of it must be decided according to the law of the domicile. The next case which arose was that of *Levy v. Davis* 2 Dow's Reports 230, in which the House of Lords affirming the judgment of the Supreme Court of Scotland decided that a Commission of Bankruptcy in England was in the assignees all the Bankrupt's personal Estates in Scotland without intimation—and Lord Eldon remarked that it did not divest the real estate there only, because at the time it did not affect the real Estate in England. Still great doubt was entertained both in England and Scotland what the decision should be in the case of a Commercial Company having a domicile in several countries when there occurred the case of a banking company carrying on business both in Edinburgh and London, several of the partners being residents in Edinburgh and several in London. This Company having got into difficulties a Commission of Bankruptcy was issued against it in London, whereupon the Royal Bank of Scotland took steps to make the Company bankrupt in Scotland also. This is the case of the Royal Bank against *Stein & Co.*, January 20th 1813 F. C. in which it was strongly urged that this Banking Company having a double domicile with a double set of creditors, each trusting to the laws as existing in the place where they had contracted with their debtor could have their estates wound up in Bankruptcy in both domiciles. But the Court in Scotland disregarded the distinction and held the proceedings in Bankruptcy in either domicile of the Company to comprehend the whole personal estate of the entire concern, and as the adjudication in Bankruptcy in England was first in date, they refused to allow a sequestration in Scotland. These cases have received the approval of all subsequent jurists. There is no greater name in legal literature during the present century than Bell, in his commentaries after stating the law as contained in these cases thus continues:—"This then settles the whole doctrine and on a footing so satisfactory, that all future cases may easily be determined on the broad principle which has been thus established." In England the law is fixed in the same way, I

merely refer to two cases as settling the question *Hunter v. Potts* 4 L. R. 184 *Sill v. Worwick* 1 H. Blackst 665.

But I cannot help quoting the authority of the great lawyer John William Smith whose too early death deprived the world and the profession of one of the best and soundest legal minds of this age. Under his chapter on Bankruptcy he says as to "*foreign property*" according to the law of England and of "almost every other country, personal property has no locality, but is subject to the law which governs the person of the owner." It follows that, unless there be a positive law there to prevent it, the Bankrupt's personal property in foreign countries passes to his assignees." In his note to this passage, besides the English, he quotes the Scotch decisions above mentioned, and thus gives them his approval. These decisions seem to fix the Law of Great Britain distinctly upon the footing that the forum of Bankruptcy is to be the domicile of the debtor. It seems a sound principle to hold that the community of law which regulates and inspires all Courts under the same territorial sovereignty should lead us in Mauritius to adopt the same principle of international law, and that we should not recognize the arguments that the Courts in England are purely foreign tribunals; and I prefer the theory of law which, in a matter involving questions between Courts not situated in the same Kingdom but representing the same sovereignty, seeks for a principle of decision rather from Great Britain than from France in such a matter. The jurisprudence of the latter country, apparently founded upon a distrust of foreign tribunals, has in several instances refused to recognize the validity and effect of commissions of Bankruptcy and similar acts of foreign Courts. This mistrust seems based entirely upon the 14th article of the Civil Code which says that "a foreigner even though not resident in France may be cited before the French Tribunals for the execution of obligations contracted by him in France with a Frenchman, and he may be brought before the tribunals of France for the obligations contracted by him in a foreign country towards the french." As we are dealing in this case not with foreigners but on both sides with subjects of Great Britain it is difficult to see how judgments founded on this article should be authoritative precedents for our decision of this case. It is clear that this article has its source in a desire to protect the french in their transaction with foreigners, and the decisions referred to being

based upon the principle contained in it, it results that the authority of a *res judicata* is much more limited in France, than it is in other Countries. Accordingly French tribunals consider the merits as well as the form of foreign judgments, and the plaintiff has little or no advantage in carrying such a judgment before a French Court. On the other hand the true doctrine seems to be that a foreign decree, the parties and the subject matter being the same, will be held conclusive unless very precise and definite allegations are made either that the Court which pronounced it had not jurisdiction, or that it was obtained by fraud, or that the proceedings involved some manifest violation of the rules of Justice, such as that a decree was given without hearing a party. I hold that the decree of the Court of Chancery, not being impugned on any of the grounds now indicated, must have the authority of a *res judicata* in this Colony. To the production of that decree all due effect must be given, and it will be necessary, if officers of the law are employed to put it into force, that the intervention of the Courts of this Colony will be required.

But it is time to consider another part of the case, that is whether the order of Liquidation ought to have the same effects as the Commission in Bankruptcy in the cases we have above quoted. I have to point out one important distinction between the order of liquidation and a Commission in Bankruptcy, the latter divests the Bankrupt of his property and transfers it as an existing right to the assignee or trustee in Bankruptcy, but the winding up under the Company's acts of 1862 and 1867 has not technically that effect, but the liquidator has to administer the Estate of the Company for the creditors, so that the Estate of the Company is held by him in trust for them, and as remarked by Judges of great repute in England the position of the creditors of a Company in liquidation is that of a *Cestui que* trust or beneficiary of the trust to whom the Estate has been virtually assigned. In the case of the Oriental Inland Steam Company *Ex parte* Scinde Railway Company July 1st 1874, L. R. Chanc. Appeals vol. 9. page 557. Lord Justice James observed "The act of parliament has enacted that, in the case of a winding up, the assets of the Company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be

"beneficially the property of the Company and being so, it has ceased to be liable to be seized by the execution of the creditors of the Company".

Further the object of the winding up acts and their main purpose is, the collection and the distribution of the assets of Companies for the general benefit of the creditors, and among them rateably, and this purpose ought to be exercised, not for the benefit of a particular creditor or creditors, but for that of all the general body of creditors of every Company. Having thus stated the purpose of the act and the mode by which it is carried out, I conclude that the whole object of the act is assimilated to procedure in Bankruptcy, by means of which the Estate of the debtor is collected together, converted into cash and then divided rateably and *pari passu* among the creditors. I have no doubt then, that the rights of the Provisional official Liquidator must be assimilated to an assignee in Bankruptcy, and that in the present case the defendant Welton is entitled to the same privileges and rights as a trustee or assignee under a commission or adjudication of Bankruptcy. It is right to limit these remarks by the further statement that I am well aware that real rights are determined by the *lex rei sitæ* and that I reserve all the rights of creditors holding hypothecs and all other real rights.

A liquidator under the act of Parliament has special power conferred upon him for the purpose of expediting the liquidation of the Estate and among others, by Section 87 when an order has been made for winding up a Company, no suit, action or other proceedings shall be proceeded with or commenced against the Company except with the leave of the Court. This section is made to apply to unregistered companies by Section 202 of the act. I have only further to remark that it is well settled law that the domicile of an incorporated company is determined by the situation of its principal place of business. In conclusion holding that the decree of the Court of Chancery has here the authority and force of a *res judicata*, that the order of liquidation has, like an adjudication of Bankruptcy, effect universally and in all countries where the debtor has property, we must give such effect to it, so as to prevent separate measures being here taken. I am therefore of opinion that the defendant Welton is entitled to succeed in his plea and that decree in this action should not be pronounced, but that

procedure should be stayed, reserving to the plaintiff his right to claim against the liquidator all that he claims in his present action.

JUDGMENT OF HIS HONOR E. J. LECHEZIO

16th July 1884

In this case the plaintiff sues Io. Thomas A. Welton, in his capacity of provisional official liquidator of the Oriental Bank Corporation, absent from this Colony but therein duly represented by G. Hamilton Traill and D. Don, and as far as need be 2o. J. A. Ferguson, manager of the said Bank in Mauritius and asks the Court to condemn the said defendants to pay to him the sum of Rs 16,660.80 c. being the amount, in principal and interest, of two sums deposited at the Bank in Mauritius by the plaintiff in 1873 and stipulated in the receipts given to him to be repayable in Mauritius respectively the first sum on the 30th May last and the second sum on the first day of June last.

To this action the defendants in their notice of defence pleaded that the winding up of the Oriental Bank Corporation having been decided upon under the English statutes known as the Companies Acts of 1862 and 1867, the high Court of Justice, Chancery Division, London, had, by an order dated the 3rd May last, appointed Thomas Abercrombie Welton provisional official liquidator of the Oriental Bank Corporation, and that in consequence the plaintiff is not entitled to bring the present action, that the only remedy which the plaintiff now has, is to prove his claim in due time in accordance with the provisions of the Companies' acts of 1862 and 1867, and at all events the present action ought to be stayed.

In Court it was argued for the plaintiff that the documents tendered did not show that the liquidator was appointed under the Companies acts of 1862 and 1867, that these acts were not Imperial acts having force of law in Mauritius; that we had our own local ordinance for the winding up of Companies under which the Bank might have been put in liquidation here, and that the local creditors of the Bank were entitled to sue their debtor before the Courts of this Colony in virtue of article 14 of the Civil Code which enacts that "L'Etranger, même non résidant

“ en France pourra être cité devant les tribunaux français pour l'exécution des obligations par lui contractées en France avec un Français.”

We were finally asked to take no notice of the order of liquidation as it came from the High Court of Justice in London, a foreign tribunal, and as no application had been made before this Court for the exequatur of that order, which therefore had no legal effect in Mauritius. Decisions of the French Court were quoted in favor of that proposition.

It may appear rather singular that the liquidator appointed in London was sued here as the principal defendant, without any reservation as to the capacity assumed by him in the powers of attorney sent here, and that the plaintiff immediately after asked the Court to take no notice of the order of Liquidation issued by the High Court of Justice. However it was explained that the intention of the plaintiff had been to sue the Bank represented by the person who is now entrusted with its affairs without admitting the legal effects of the order given in London, and I think that in presence of the important issues which are before the Court it may be more proper to set aside what may after all be only technical objections. With regard to the two documents tendered by the defendants viz : the appointment of the liquidator and the powers of attorney sent by him to Mauritius, I think that there cannot be any doubt that Mr. Justice Chitty proceeded under the companies acts of 1862 and 1867. These acts are fully mentioned in the heading of the order, and in the body of the power of attorney which is approved and sanctioned by the judge.

It is true that these acts do not appear to be Imperial statutes, and that we have our own Local Law (Ordinance No. 36 of 1882) which provides for the winding up of Companies with a limited liability, and which is copied almost verbatim from the English acts, and if we had before us an application for the separate winding up of the local affairs of the Bank, and for the appointment of a local liquidator to act conjointly with the liquidator in England, we would consider what may be the rights of local creditors to a local liquidation, but such is not the case now before us. The plaintiff does not wish, as a consequence of the winding up order issued in England, that we should also give a similar order here ; he wants us to ignore completely the liquidation which has already

begun in London, and the powers sent by the liquidator to his representatives in Mauritius, and to allow him to obtain a writ of execution enabling him to seize or attach any property belonging to the Bank in Mauritius. In fact his contention is that the winding up order given in England has no legal effect here because the Court that issued it must be treated by us as a foreign Court, and its decisions have no force until they have been rendered executory by this Court.

The principal decision quoted on behalf of the plaintiff is an *arrêt* of the Court of Paris of the 7th March 1878 in re : Syndic Hoffman reported in Dev. 79. 2. 164. In that case it was ruled that a trader who had his principal establishment in London and branches in Paris, Milan, and Hamburg, could be declared Bankrupt in Paris, although there had been already an adjudication of Bankruptcy against him in London, and the exequatur applied for by the English assignee for the execution of the English Order in France was refused. The *arrêt* of the Court of Paris is so brief that it would not be possible to understand the grounds on which the decision was given if we did not refer to the conclusions of the “avocat général” Hémar which preceded it. I there read the following passages which I transcribe *verbatim* as they are remarkably clear “ La thèse développée devant les premiers juges au nom de White et repoussée par eux est celle de l’indivisibilité et de l’universalité de la faillite envisagée comme principe de droit international privé. Elle est très controversée aussi bien en France qu’à l’étranger. Je dois d’abord en préciser la portée : Elle a pour point de départ cette règle, admise par toutes les législations dignes de ce nom, qui est écrite dans les art. 2092 et 2093, Code Civil. Les biens du débiteur sont le gage commun de ses créanciers. On est ainsi conduit à affirmer l’unité du patrimoine et l’universalité du gage qu’il constitue ; chaque débiteur n’a qu’un seul patrimoine et ce patrimoine unique répond en même temps et de l’ensemble des dettes et de chacune d’elles en particulier.”

“ Donc, un commerçant ayant plusieurs établissements, ne peut être en faillite dans l’un d’eux et rester *intégré* dans les autres ; cesse-t-il ses paiements sur un point ? l’insolvabilité n’est pas partielle, mais s’étend à tout le commerce.”

“ Ce commerçant est en faillite partout et

" n'est qu'une fois en faillite parce que le  
 " gage étant universel son insuffisance en-  
 " gendre une insolvabilité générale. De ce  
 " principe, il résulte que le siège d'une faillite  
 " est au domicile du failli. En effet la masse  
 " créancière se trouve, par le fait de la fail-  
 " lite, constituée à l'état de personne morale  
 " et substituée à l'individualité du failli  
 " qu'elle continue. Elle est là où était le  
 " failli. Il en résulte encore que l'insolvabi-  
 " lité étant générale et indivisible, la liquida-  
 " tion qui en est la conséquence est également  
 " indivisible, en ce sens qu'elle a pour but  
 " une réalisation unique, ainsi qu'une répar-  
 " tition basée sur une seule et même propor-  
 " tionnalité sans distinction de personne ou de  
 " localité."

" Ces déductions doctrinales sont absolu-  
 " ment incontestables, si on les limite à l'hy-  
 " pothèse d'un commerçant exploitant un  
 " établissement principal et des succursales  
 " relevant sans exception de la souveraineté  
 " française."

He then proceeds to show that it might be dangerous for french creditors to trust a foreign Court " qui ne sera peut-être pas toujours aussi rassurant que le pouvoir anglais " and he invokes article 14 and also art. 3 of the Civil Code as enactments in favour of the French creditors.

This decision was criticized by writers on International Law (see, besides the notes under the decision, " Journal de Droit International Privé " year 1879 p. 81 and a contrary decision of the Court of Milan in similar circumstances in Dro 79. 2. p. 161). It may be very good jurisprudence in France in the present state of french Legislation, and I am not prepared to express any opinion upon it at present, because I did not think it necessary for my decision in this case to examine very minutely the reasons which guided the French Court, having found the distinction established by the " Avocat Général " Hémar sufficient to explain why the Court of Paris refused to give effect to the English adjudication of Bankruptcy in the Hoffman case. That distinction is that principles, which may be very good when the principal firm and its branches are under the same sovereignty, should not apply when they are under different sovereignties. There is no doubt that the French Courts in interpreting strictly the terms of article 14 of the Code Civil were actuated by a feeling of distrust of foreign Justice, which they feared would not protect sufficiently the interests of French subjects. So that I understand that

the difficulties which arose in France, would not have arisen if the principal establishment, instead of being under the English flag and amenable to English Courts, had been under the French flag and amenable to French Courts. Now, it cannot be said that England and the High Court of Justice in London are to us a foreign power, and a foreign Court in the sense given to those expressions by the " Avocat Général " Hémar. The London Courts and the Mauritius Courts have separate jurisdictions, but they are under the same sovereignty, and I cannot certainly treat the High Court of Justice of England as a *pari passu* foreign Court, and when an order emanating from it is shown to me I cannot consider it as having no value at all, because no application has been made to this Court to render it executory here, and more especially so in matters of Bankruptcy which relate to a Company having its principal domicile in London and one of its branches here. In the case of the Royal Bank of Scotland v. James Cuttbert and others reported by *Ross Vol. 1 p. 462* the Court of Session so far back as 1813 held that a Commission of Bankrupt issued in London vests in the assignees under it all the property of the bankrupt wherever situated, precluding creditors in Scotland from attaching by sequestration their debtors' property remaining or situate in that country. In that case four partners had, as such, houses of business both in England and in Scotland, but of whom two were domiciled in England and two in Scotland.

A similar decision was given in *Selking v. Davis* 1814 2 *Ross* 291, by the house of Lords it was there held that an English Bankruptcy was paramount to a subsequent Scotch sequestration when the bankrupt was domiciled in Scotland but traded both in England and Scotland.

These cases were quoted on behalf of the defendants to show that in Scotland, a country where the law of Bankruptcy is not the same as in England, effect was given to an order emanating from the English Court.

Here we have not to deal with a Commission of Bankruptcy, but I have no doubt that the same principles should apply to a winding up order, the object of which is to distribute the assets of the Company rateably amongst its creditors, and enforce contributions against its shareholders or contributories, and make them pay what they are liable to pay, with a view to liquidating the affairs of the Company. *Jessel Master*



the Rolls, in re International Pulp and Paper Company, 3 Law Reports Chancery Division page 598 adds:—"How is that object effected. By stopping all acts and suits brought against the Company when the winding up is commenced, so as to compel the creditors to come and share rateably."

Further on he adds "There can be no reason that I can find for limiting them (meaning the words, action, suit or other proceeding) except that the Court has no power to enforce its order. I agree, if any creditor in Turkey, Russia or any other purely foreign country, were to bring an action, although it would be desirable in the interests of the person concerned in the litigation to make that creditor come in with the rest, yet the Court cannot restrain the action for want of power—not from want of will or want of provisions in the act of Parliament, but simply that the act of Parliament cannot give this Court jurisdiction over Turkey or over Russia. That is the only reason..... Therefore as to a purely foreign country it is of no use asking for an order because the order cannot be enforced."

I have quoted at some length the opinion even in that case by the eminent English judge, because I find that the distinction which he makes in matters of this kind between a purely foreign country, such as Turkey or Russia, and countries abroad but under the British Dominion, coincides exactly with the distinction made by the French "Avocat Général" Hémar, whose conclusion I have already mentioned. In Westlake p. 144 I also read that an English Bankruptcy or the winding up of a Company in England, which is domiciled in England, carries all the real or the immoveable property of the bankrupt or Company in any part of the British Dominions, and he quotes several decisions in support of that dictum.

I think it useless to examine whether an injunction coming from the Court of Chancery and addressed to the plaintiff would be binding upon us, and would prevent us from hearing the present case, but what I deduce from the principles gathered from the French and the English authorities quoted on both sides of the bar is that in matters of Bankruptcy, an order given by the Court of the principal domicile of the trader who has stopped his payments, cannot be ignored by the Court within whose jurisdiction is a branch firm of the same trader, and that, on the contrary effect should be given to it,

when both Courts are under the same sovereignty.

Acting in conformity with these principles, which I consider as true and sound, and applying them to the circumstances revealed to us by documents emanating from the Chancery Court in London, I am of opinion that this action ought to be stayed as prayed for by the defendants.

Action stayed until otherwise ordered by the Court.

## SUPREME COURT

ACTION IN DELIVERY OF A LEGACY—INTERVENTION OF THIRD PARTIES AS HEIRS—IDENTITY OF THE PERSON UNDER WHOSE NAME THE INTERVENING PARTIES CLAIM—ARTICLE 1853 OF CIVIL CODE.

*In this case Mrs. Widow Messen by her will dated the 9th April 1882 made a legacy of Rs 50,000 to the heirs of her late husband, Pierre Hippolyte Messen, who was born at Bordeaux. The Curator of Vacant Estates representing these heirs, whose names were not known, entered an action against the heirs of widow Messen, and claimed the delivery of the legacy on behalf of these relatives of the late Messen.*

*The defendants denied, on the merits, the Curator's right to sue on behalf of parties whose names were not given, and further strongly denied that there were any relatives of the late Messen still alive.*

*Certain parties alleging themselves to be the heirs of the late Messen, having caused regular powers of attorney to be sent to Mauritius, intervened in the case and contended that they were the sole heirs of the late Pierre Hippolyte Messen on the paternal and maternal sides.*

*The main question before the Court was one of identity, as the intervening parties claimed as being the heirs of Pierre Paul Polycarpe Messen Drapien, while the defendants contended that Pierre Paul Polycarpe Messen Drapien, born on the 27th May 1808, and the son of Marc Antoine Messen Drapien could not be the same person as Pierre Hippolyte Messen, who, according to his own declara-*



tion, was born on the 14th May 1809 and was the son of Antoine Messen.

*Held that from all the facts and circumstances of the case the Court had gathered the presumptions "graves précises et concordantes" which according to Article 1353 of the Civil Code may supplement parole evidence when it is not materially possible to have it and that those presumptions were sufficient to establish the identity of Pierre Paul Polycarpe Messen Drapien.*

*The Court therefore ordered the legacy to be paid to the intervening parties; one half to the relatives on the paternal side and the other half to the relatives on the maternal side.*

CURATOR OF VACANT ESTATES—  
Plaintiff

versus

GUILLARD & OTHERS,—Defendants.

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor FRÉDÉRIC WILLIAMS,—Puisne Judge

WILLIAM NEWTON,—Counsel for the Intervening parties.

F. ROBERT & HENRY BERTIN,—Attorneys for the same.

LOUIS ROUILLARD,—Counsel for plaintiff  
HENRY LECLÉZIO,—Attorney for the same

VICTOR DELAFAYE,—Counsel for Henry Krumpholtz & Jules Guillard & ors.

EDMOND DUVIVIER & ERNEST LEBLANC,—  
Attorneys for the same.

PIERRE LÉONCE CHASTELLIER,—Counsel for Widow Corsin & C. M. Guillard

FRÉDÉRIC VICTOR & ERNEST LEBLANC,—  
Attorneys for the same.

EDGAR GALLET,—Counsel for Widow N. Guillard & Jules Guillard.  
HENRY THATCHER & GEORGES KÖNIG,—  
Attorneys for the same.

Record Number 21,644.

17th July 1884.

In June 1882 the Curator of Vacant Estates who had been placed in charge of the Vacant Estates and undefended rights in Mauritius of the relatives of the late Pierre Hippolyte Messen, entered this action against the heirs of the widow Messen, in order to obtain from this Court a judgment condemning them to pay to him in his capacity, the sum of Rs 50,000, amount of a legacy made by widow Messen to the relatives of her deceased husband, by her will dated the ninth April 1852.

The Defendants pleaded several pleas, one of which was preliminary, in which they asked for the security *judicatum solvi* because the relatives, if any, of the late Messen were foreigners, this was allowed by the Court and the security given; with regard to the pleas on the merits they denied the right of the Curator to sue on behalf of parties whose names were not given and besides the defendants denied that there were any relatives of the late Messen still living.

The Curator had written to the Mayor of Bordeaux, in France, from whence Messen came when he arrived in Mauritius and powers of attorney were sent by persons who allege that they are the sole heirs on the paternal and on the maternal sides of Pierre Hippolyte Messen. Those persons have intervened in this case to claim the legacy made by widow Messen. One of them who was not represented at the time of the hearing of the case has since sent a power of attorney which has been filed in Court.

The main point which we have to decide in this case is a question of identity. It is not now disputed that if the intervening parties, who are before the Court, satisfy us that the person whose heirs they say they are is the same as the late Pierre Hippolyte Messen who died in Mauritius, they are entitled to the legacy made by widow Messen.

The intervening parties claim as being the relatives of Pierre Paul Polycarpe Messen Drapien, born at Bordeaux, on the 27th May

3 and who was declared to be the son of Marc Antoine Messen Drapien and of Jeanne Solis.

When the late Pierre Hippolyte Messen arrived in Mauritius on the 3rd November 1838 on board the French Bark "Atlantique" from Bordeaux, he gave his name as P.H. Messen and his profession as merchant, according to a certificate signed by the Harbour Master.

The next document concerning him is his declaration of marriage in 1838 with Miss Guillard in which he declares that he was born on the 14th May 1809, at Bordeaux, and that he is a legitimate son of Antoine Messen and of Jeanne Solis, deceased.

Then comes the declaration of his death which took place on the 27th March 1874 in which his names are given as Pierre Paul Hippolyte Messen and his age 63 years and 6 months.

The defendants argued that Pierre Paul Polycarpe Messen Drapien, born on the 27th May 1808 and the son of Marc Antoine Messen Drapien, cannot be the same person as Pierre Hippolyte Messen, who, according to his own declaration, was born on the 14th May 1809 and was the son of Antoine Messen.

Acts of notoriety made in Bordeaux were tendered in this case as evidence of the identity of our Messen, as he was called, with the Messen Drapien, of Bordeaux, but, as a rule, we have not much confidence in those acts which are prepared for the purposes of a case and by persons who speak of what they have heard and not of what they personally know. They may be of some value in certain cases, for instance, to show that the parties described in them are the only parties entitled to a succession, when there has been no inventory made; in a case like the present one we cannot consider them as evidence, but only as part of the argument of Counsel.

After a careful consideration of this case we think that there are facts derived from the documents produced which constitute very strong circumstantial evidence in favour of the theory of the intervening parties: that Pierre Hippolyte Messen or Pierre Paul Hippolyte Messen, as he is called in the declaration of his death, is the same person as Pierre Paul Polycarpe, the son of Marc Antoine Messen Drapien and Jeanne Solis.

The first fact is that they were born at Bor-

deaux, it is true that our Messen stated in his act of marriage that he was born on the 14th May 1809 while Pierre Paul Polycarpe was born on the 27th May 1808. But it may have happened that our Messen had either forgotten the exact date of his birth (it would appear that he had not brought with him to Mauritius his act of birth) or that he desired to appear younger when he married. At all events there is no evidence to show what has become of Pierre Paul Polycarpe if he is not the same person as our Messen, and there is also no evidence to show that Mr and Mrs Messen Drapien had any other child than Pierre Paul Polycarpe.

The second fact is that our Messen's mother was Jeanne Solis the same name as that of the mother of Pierre Paul Polycarpe and there is this circumstance that she was dead at the time of the marriage of our Messen in 1838 and the mother of Pierre Paul Polycarpe was also dead at that time.

Thirdly there is the fact that our Messen's father was in 1838 an ex-merchant whom he called Antoine Messen, who was still alive and living at Bordeaux and the father of Pierre Paul Polycarpe was also an ex-merchant still alive and living at Bordeaux at that time under the name of Marc Antoine Messen Drapien.

The difficulty is about the name of *Drapien* which was not given in Mauritius, by our Messen, as being the name of his father and his son, and also about the christian names of our Messen which are not all the same as those in the act of birth coming from Bordeaux.

With regard to these, the names of *Pierre* and *Paul* are to be found in the acts concerning our Messen in Mauritius but *Polycarpe* has been replaced here by *Hippolyte* and it was suggested that Polycarpe is so ridiculous a name that one can understand that our Messen changed it into Hippolyte, and from an inventory made at Bordeaux in 1829, it would appear that Pierre Paul Polycarpe had already taken the name of *Hippolyte* and that he had also dropped the name of *Drapien* for he signed the inventory *Messen* only; with regard to the name of the father who is called Antoine Messen by our Messen, his names are Marc Antoine Messen Drapien in the act of birth of Pierre Paul Polycarpe; but when his wife Jeanne Solis died, she is described in the declaration of her death as the wife of *Antoine Messen* and this would tend to shew that even

in France, before our Messen came to Mauritius, and he only left Bordeaux after the death of his mother Jeanne Solis, which took place in 1834, Marc Antoine Messen Drapien was also sometimes simply called Antoine Messen. It was also suggested that Jeanne Solis having been separated from her husband while her son Pierre Paul Polycarpe was an infant, and the child having been brought up by her and having always lived with her as would appear from the inventory of 1829, Pierre Paul Polycarpe may have taken a dislike to his father and dropped the name of Drapien, and that this may also account for the fact that after his settlement in Mauritius he took no notice of him.

From all these facts and circumstances we gather that we have the *presumptions graves, précises et concordantes* which according to article 1353 of the Civil Code may supplement parole evidence, when it is not materially possible to have it before the Court, and we are of opinion that those presumptions are sufficient to allow us to declare that the indentivity of Pierre Paul Hippolyte Messen with Pierre Paul Polycarpe Messen Drapien has been established to our satisfaction. Such being the opinion of the Court, we must order the legacy to be paid to the intervening parties, one half to the relatives on the paternal side and the other half to the relatives on the maternal side; one of the relatives J. B. Victor Vermeil was not represented in Mauritius, as we have already said, when the case was heard, but the power of attorney which has been sent by him, having been filed since and being regular, we think that the share accruing to that party should be paid direct y to him and not to the Curator of Vacant Estates. This latter having, however, acted in the interest of all the relatives of the late Messen, we think that he is entitled to the costs made by him to obtain the delivery of the legacy; and we are besides of opinion that this is a case in which the costs of all parties concerned in the suit should be considered as costs of succession.

### SUPREME COURT

*In this case the Court decided that the Plaintiff should furnish security for the Defendant's costs on the ground that the Plaintiff resides in a French Colony and has no property in Mauritius.*

JOSEPH CRÉCY DE LANUX.—Plaintiff

versus

PIERRE BOYER DE LA GIROUD.—Defendant

and

JOSEPH CRÉCY DE LANUX.—Plaintiff

versus

FRÉDÉRIC BOYER DE LA GIROUD.—Defendant

Before

His Honor EUGÈNE JULES LECLERCQ.—Judge.

His Honor ANDREW MURK.—Puisne Judge

and

His Honor JOHN ROUILLAM.—Puisne Judge

M. BROWN.—Counsel for plaintiff  
V. G. DUCRAY.—Attorney for the same

E. GALLET.—Counsel for P. B. de la Girod  
G. KERNIG.—Attorney for the same

W. NEWTON.—Counsel for F. B. de la Girod  
G. KERNIG.—Attorney for the same

Records Nos. 22,548 & 22,549.

22nd July 1884.

Judgment on motion made by defendant for security "judicatum solvi."

HIS HONOR THE CHIEF JUDGE

The security prayed for here is asked of the Court in three grounds, the first is that the plaintiff, although he has been naturalised in Mauritius as a British subject, is still an alien because he has resumed his french nationality; the second ground is that he is in insolvent circumstances; the third ground is that he is out of the jurisdiction of the Court, so all

appearances permanently settled in a french colony, and that he has no property in Mauritius. We do not think it necessary to examine the two first grounds, because we all agree that this case may be decided in favor of the defendants, on third ground. It has been ruled in England and also in Mauritius in the case of Dagostini, that, even in the case of a British subject who is out of jurisdiction of the British Courts, a defendant is entitled to ask for security of the jurisdiction which may answer for the costs incurred by the defendant and to be paid to him in case he wins his action. In this case we have an affidavit, which is not contradicted, which shews that the plaintiff is residing in "Reunion" a French Colony, and that he has no property in Mauritius. We therefore think that this application comes within the ruling of the learned Judge in Dagostini's case, and we see no reason why our decision in this case should differ from the ruling in the case of Dagostini, because this is an action entered for a reddition of accounts.

The matter at issue cannot have much influence in a question of "judicatum solvi."

With regard to the amount of security asked for we think it is somewhat high, and that the sum of seven hundred and fifty rupees for each case will sufficiently answer the costs to which the defendants will be put if they win their cases;—fifteen days will be allowed to the plaintiff in which to deposit the amount or to give security therefor to the satisfaction of the Court.

Costs reserved.

### SUPREME COURT.

APPEAL FROM CONVICTION OF DISTRICT MAGISTRATE — CHARGE OF LARCENY UNDER ARTICLE 309 OF PENAL CODE—DISPENSER STEWARD. HIS POSITION ON THE ESTATE—MISAPPROPRIATION BY HIM OF MEDICINES IS EMBEZZLEMENT AND NOT LARCENY.—CONVICTION QUASHED.

*In this case the appellant, who was a dispenser steward on "Beau Fonds" Estate, took some quinine from the Hospital of the Estate and sold it to a stranger.*

*Having been prosecuted for domestic larceny before the Magistrate and convicted by this*

*latter to two months imprisonment, he appealed from the conviction.*

*Held by the appellate Court that a dispenser-steward of an estate who takes quinine or other medicine from the hospital of which he has charge, and who sells such quinine or medicine to a stranger commits an embezzlement and not a domestic larceny. The Court therefore quashed the Magistrate's conviction. No costs.*

HUET.—Appellant,

versus

THE QUEEN.—Respondent.

Before

His Honor ANDREW MURE—Puisne Judge

and

His Honor JOHN ROUILLARD—Acting Puisne Judge

THE HON. W. NEWTON,—Counsel for Appellant,

A. PITOT,—Attorney for the same.

JOHN M<sup>c</sup> DOUGALL GIBSON,—Counsel for Respondent,

J. GUIBERT,—Attorney for the same

Record No. 508.

25th July 1883.

*His Honor Mr. Justice Mure*

This is an appeal by a man named Huet, who was charged before the District Magistrate of Grand Port with the crime of theft under section 309 of the Penal Code.

The information is to the effect that on the 7th February 1884 at "Beau Fonds" Estate, the appellant, being a person in the employment of the proprietors of the stolen property, had stolen 30 grains of quinine, valued at 30 cents of a rupee. To this charge, he pleaded not guilty, but the magistrate convicted him under the 309th section of the Penal Code,

which is the section which deals with cases of larceny by servants.

The magistrate deals with this case as one of larceny. He says that this quinine did not get into the hands of Huet in virtue of any trust or deposit, the breach of which constitutes embezzlement, that the matter does not come under the 333rd section of the Code, that there is proof that Huet took the quinine, the care of which he had, and without the knowledge or consent of the owner sold it to a stranger to the estate; from that reason he concludes that this is a case of larceny. It is necessary to settle first the species of facts on which the magistrate proceeded: In doing so we do not review the facts of the case but merely take them as proved in order to draw the proper legal conclusion from them. It appears that Huet was a dispenser steward of the "Beau Fonds" Estate, in that capacity he was placed in charge of the Hospital, and it is in evidence that when there were no patients in the Hospital he kept the key of the building.

The medicines were kept in a glass case in a room in the Hospital under his care and control. The position of matters must be taken from the evidence of Mr. Laur de St. Romain one of the chief officials of the Estate, who says "when there are no sick the Hospital is shut up and locked up, the key remaining with accused, the medicines are in a glass case, which is locked up. It is the duty of accused to see that no body sells any medicine—*Cross examined*: The accused receives the medicines from the manager Mr. D'Hotman and has to give them to the sick on the request of the Doctor. He has also to give an account of them to the manager—accused is entrusted with the keeping of the medicines under the control of the manager. These medicines are in his possession"—and further on he says "if a deficiency had occurred and had been found out by the manager he would have had to account for the deficiency."

Upon this statement of the facts, we have to determine whether this is an act which falls under the category of theft or under that of embezzlement.

The words "Vol" and "larceny" or "theft" I suppose are terms which are mutually interchangeable; that is to say that one would naturally translate "Vol" by "larceny" or "theft"—But undoubtedly they are not equivalent in the idea of

the thing—for though the original definition of "theft" by the law of England and Scotland is this, a crime in which there has been a fraudulent taking the possession of property belonging to another for the purpose of gain and that is in conformity with the old Roman definition "*contractatio fraudulenta rei alienae lucri faciendi gratia*."

Both in England and in Scotland the term has been extended to many cases where the party has the custody of an article the possession of which is held by the owner. On the other hand in our definition of Larceny contained in the 301st article of the Penal Code the terms "fraudulently abstract" is translated from the french "*soustraire frauduleusement*" and the result of the use of these words has been that invariably, when theft has been committed in France, the action of "*enlèvement*", that is of removal of property from one place to another, is an essential element of the crime.

As regards embezzlement, there is no doubt that by the law of England the term is generally used when the property is in the possession of a party occupying an official position, and who has a certain official duty in reference to the property in his possession—such as treasurers or secretaries of bodies corporate, factors &c, and the misappropriation of moneys in such circumstances has generally been called embezzlement in England and Scotland—and though the word is translated into french by "*détournement*" or "*abus de confiance*" the idea contained in the words are not essentially the same. Under the french Code the property, which is misappropriated, of necessity is, in the possession of the person who deals criminally with it, with the assent of the owner—it is delivered to him with his assent and consequently the word used to indicate the nature of the crime is generally "*détourner*" or "*dissiper*".

The Court has carefully read and considered many of the cases decided by the Court of "Cassation" in France as well as all those which have previously been decided in this Court and we consider that there are two passages in the works of Chauveau and Hélie which we think correctly summarise the result of the decided cases, and which bring out distinctly the difference between "vol" and "abus de confiance."

One is a decree of the Court of "Cassation" to this effect:—Chauveau and Hélie Vol. 5 Sect. 1886. "*attendu que la soustrac-*

“ tion qui est l'un des éléments constitutifs  
 “ du délit de vol, n'existe que lorsque la  
 “ chose soustraite a été appréhendée contre le  
 “ gré du propriétaire qu'il n'y a donc pas de  
 “ soustraction dans le sens précis et légal de  
 “ ce mot dans le cas où la chose a été remise  
 “ volontairement par les propriétaires à la  
 “ personne inculpée, qu'il importe que cette  
 “ remise n'ait été que momentanée et faite  
 “ sans la condition implicite d'une restitution  
 “ immédiate, puisqu'une remise volontaire de  
 “ la chose, quelque soit sa durée, exclut  
 “ nécessairement le fait de la soustraction. ”  
 And at page 434 of the same volume there is  
 this : “ ce qui caractérise le vol c'est la sou-  
 “ traction, la chose est enlevée par ruse ou  
 “ par violence des mains de son possesseur,  
 “ l'agent s'en empare malgré celui-ci ou à  
 “ son insu. L'abus de confiance suppose, au  
 “ contraire, que la chose se trouve légitime-  
 “ ment entre les mains de l'agent, il la détient  
 “ avec assentiment du propriétaire il n'em-  
 “ ploie ni la ruse ni la violence pour s'en em-  
 “ parer. ”

This being the principle of the law of France, which we are bound to administer here, it seems enough, to determine the character of the crime alleged here, to say that the quinine misappropriated was delivered into the appellant's hands by the manager of the Estate, and left in his hands with the consent of the same manager, he had the care and custody and guardianship of the medicines, with the assent of the proprietors and officials of the Estate, and he kept the key of the establishment in which they were contained when it was not used. That being so, it seems to me that the crime of necessity falls under article 333 of the Penal Code which says, “ whoever shall embezzle, squander  
 “ away or destroy, to the prejudice of the  
 “ owner, possessor or holder thereof, any  
 “ goods, money, merchandize, bills, acquit-  
 “ tance or other writing containing or opera-  
 “ ting an obligation or discharge, which had  
 “ been delivered to such person merely in  
 “ pursuance of any hiring, deposit or trust,  
 “ or for any renumerable labor. ”

It is clear that in this case the medicines were delivered to the appellant for a renumerable labor and with the assent of the owner, and therefore, that the appellant should have been convicted under the 333rd section and not under the 309th section.

The conviction of the District magistrate is therefore quashed. No costs.

## SUPREME COURT.

**STOREAGE OF GUANO. — PERSON WHO HAS MADE ADVANCES ON GOODS HAS THE RIGHT TO SELECT STORE IN WHICH SUCH GOODS ARE TO BE PLACED.**

*Messrs. Elias, Mallac & Co, intervening parties and holders of the Bills of Lading of certain guano, moved that the guano which is now in the Central Dock Warehouses be removed to the Warehouses of the Albion Dock which agreed to store the guano at a cheaper rate.*

*The Egyptian Bank objected on the ground that it had made advances on account of the guano, and was entitled to select the store in which it was to be placed.*

*Held that the party who has the right of retention for necessary expenses made by them has also the right to choose, in the first instance, the Stores in which the goods, on which the right of retention exists, are to be placed, but as under the circumstances the rights of the owners of the guano might be prejudiced if the storeage of the guano be paid for as at present, the Court orders that a short delay be granted to the Egyptian Bank to obtain equal terms to those proposed by the Albion Dock Company for the storeage of the guano. If the Bank does not obtain these terms, the guano to be transferred to the Albion Dock Stores in the name of the party who made the advances.*

NORRIS,—Plaintiff

versus

COMPAGNIE FINANCIÈRE ET COMMERCIALE DU PACIFIQUE,—Defendant

ELIAS, MALLAC & Co. } Intervening  
 and } parties  
 FRANCO-EGYPTIAN BANK }

Before

His Honor EUGÈNE LECLEZIO,—Chief Judge

and

His Honor JOHN ROUILLARD Acting Puisne Judge

**V. DELAFAYE**,—Of Counsel for Plaintiff  
**A. J. COLIN**,—Attorney for the same

**W. NEWTON**,—Counsel for Defendant.  
**E. SAUZIER**, Attorney for the same

**P. L. CHASTELLIER**—Counsel for Elias Mallac & Co.

**A. J. COLIN**,—Attorney for the same

**V. KIVERN**,—Counsel for Bloch Manager of the Franco-Egyptian Bank.

**E. SAUZIER**,—Attorney for the same

Record No. 22,476

25th July 1884.

HIS HONOR THE CHIEF JUDGE.

This is an incident in an action which has been entered before this Court with regard to certain guano, the bills of lading of which are now in the hands of the intervening parties, Messrs Elias Mallac & Co. Those intervening parties move the Court now that the guano, which have been deposited in the stores of the Central Dock, Barnard's establishment, should be removed to the Albion Dock, because the storage claimed by the Central Dock from the Franco-Egyptian Bank, the Agents of the defendants and the party who stored the guano in the Central Dock, at a time when they supposed that they would be the holders of the bill of lading, is higher than the amount generally claimed by the Albion Dock by 9 cents of a rupee per ton for the storage of guano, the amount at which the Albion Dock is ready to receive these guano now being 31 cents of a rupee per ton, whereas the amount claimed by the Central Dock from the Defendants is 40 c. of a rupee.

The objection of the defendants and also of the "Banque Franco-Egyptienne" who have made certain expenses as agents of the defendants, is that this motion cannot be entertained by the Court because the "Franco Egyptian Bank" having made the advances had a lien upon that guano, a right of retention according to our local law, and that they were entitled to retain possession of the guano in the stores which had been chosen by them when they thought they would be the bearers of the bill of lading. On the other hand, the intervening parties, who make the motion, state that they do not wish

to deprive the Franco Egyptian Bank of their right of retention, but that until the Court has settled the differences which exist between them, and which are the subject matter of a law suit before the Court, the guano should be stored in the Albion Dock.

It appears that the sum for which the Bank have contracted to store the guano in the Central Dock is one of the items in dispute; the ownership of the guano is no longer in dispute; it is not denied that the intervening parties, Elias Mallac & Co. are the holders of the Bills of lading and that therefore they are the owners of the guano; the only dispute is with regard to certain expenses made by the Bank and for the reimbursements of which they claim the right of retention.

There is no doubt that in law the party who has the right of retention for necessary expenses made by him has also the right to choose in the first instance, the stores in which the goods on which that right of retention exists, are to be deposited. At the same time when the owner of the goods comes before a Court of Justice and says: the storage in the stores you have chosen is much higher than in other stores in which the same goods can be placed as safely, preserving at the same time your right of retention, I think the Court should examine whether the owners might not suffer prejudice at a given moment if his application were to be rejected in 10/10: the main case may last a long time; the judgment of the Court in the main case may be appealed from, and if the litigation were to last eighteen months or two years, the difference in the amount to be paid for the storage, according to the affairs we have before us, would be very high. In these circumstances we are of opinion that the rights of the owners of the guano may be to a certain extent prejudiced, if we were to allow the storage to continue in a Dock which claims a much higher sum than the amount usually claimed for the storage of guano, and which is actually proposed by another Dock; but, at the same time, we also think it is but right that the Dock which has been chosen in the first instance by the party who thought he would be the bearer of the bills of lading, should have an opportunity of reducing the amount of storage at which the guano have been deposited, and we will give that opportunity, both to the "Compagnie Financière & Commerciale du Pacifique" and to the "Franco Egyptian Bank," who as mandatory made advances for the payment of the freight and other expenses, to obtain that reduction from

the Central Dock. We will, therefore, fix a reasonable delay, until Wednesday, within which the Franco Egyptian Bank will try to obtain terms equal to those which have been proposed by the Albion Dock Company for the storage of the guano. If the same terms are obtained the judgment of the Court will be that the guano will remain in the Central Dock until the main case is finally settled. If the defendants do not obtain the same terms as those proposed and which we think reasonable, then the Court will order the transfer of the guano to the Albion Dock in the name of the party who made the expenses in order that he should not lose his rights of retention.

The case is to be mentioned on Wednesday next.

### SUPREME COURT

*Upon the application of the Commercial Bank, the Court ruled that the Curator of Vacant Estates should be sent into possession of the Estate of W. Kidson & Co. a firm lately trading in Mauritius and whose affairs are alleged to be in a state of insolvency.*

*Also that the mandate given by the Firm, the partners of which are in England, to J. P. W. Kidson is recalled by the insolvency or "déconfiture" of the Firm.*

THE MAURITIUS COMMERCIAL  
BANK.—Plaintiff.

versus

J. J. BROWN and another,—Defendants.

Before

HIS HONOR ANDREW MURE—Puisne Judge

and

HIS HONOR JOHN ROUILLARD—Acting Puisne Judge

P. L. CHASTELLIER and V. KIVERN,—  
Counsel for Plaintiff.

A. J. COLIN,—Attorney for the same

JOHN M<sup>e</sup> DOUGALL GIBSON,—Substitute Procureur and Advocate General,— Counsel for Defendant

J. GUIBERT,—Attorney for the same

V. KIVERN,—Counsel for Kidson

A. ROHAN,—Attorney for the same.

Record No. 22,485

25th July 1884.

This is an application made in Chambers by which the Commercial Bank ask that the Curator of Vacant Estates should be sent into possession of the Estates of W. Kidson and Company—a firm lately trading in Mauritius, and whose affairs are alleged by the applicants to be in a state of insolvency. In consequence of this insolvency the power of attorney granted by W. Kidson & Co. in favor of John Pexall William Kidson, who managed the affairs of the firm in Mauritius as their mandatory, is alleged now to be extinct. It appears that the above firm has some property in Mauritius and as they are said to have now no legal representative here, the applicant maintains that the Curator of Vacant Estates is bound to take care of that property.

The application was made to a Judge in Chambers, was opposed there both by the Curator of Vacant Estates and W. Kidson, the Mandatory of W. Kidson & Co, but in respect of its importance and delicacy it was referred to the Court, before whom the two defendants respectively maintained the same attitude of opposition as in Chambers.

The questions for the consideration of the Court seem to be three in number :

1o. Is the Company trading under the style of W. Kidson & Co in Mauritius as a matter of fact in a state of insolvency or as it is alleged in french "déconfiture."

2o. That being answered affirmatively does the state of insolvency or "déconfiture" recall the mandate given by the firm, the partners of which are in England, to J. P. W. Kidson their mandatory ?

3o. If the mandate be recalled, is it the duty of the Curator of Vacant Estates to enter into possession of the Company's assets and to manage and administer the same ?

In regard to the question of fact, the form of such applications and the want of all plead-



ings in them render it necessary that the Court must rely on the various documents produced and the statements and admissions of parties at the bar. There is an affidavit produced which is not contradicted, to the effect that various judgment have been taken against W. Kidson & Co. which have not been paid, that their stock in trade has been seized and sold, and that they are utterly insolvent. As a matter of fact the applicants further alleged and have produced evidence to show that the Company have drawn in England two Bills on themselves in Mauritius for considerable amounts, with relative Bills of Lading and Invoices of goods, which bills are due respectively on 28th August and 5th September next. These Bills have been endorsed over to the applicants, the Commercial Bank, to which also the relative Bills of Lading have been endorsed with a special order to deliver to them, and who are also holders by indorsation of the Policies insuring the goods against sea risks. The Bank explain that they are unable to present Messrs W. Kidson & Co's., bills to anyone either for acceptance or for payment, as their Mandatary no longer legally represents them. From these bills and the mode in which the business is transacted, we gather that the goods have not been paid for in England by capital of the Company there and that the Bills and other documents have been transferred to the Bank to raise the necessary fund to do so. These matters are referred to, because as there was a branch in London, it might be doubtful whether the position of W. Kidson & Co. in Mauritius was conclusive of the matter of fact, though we think it almost certain on the above facts, that the important consideration for the Court is, what is the state of matters in Mauritius. But we are relieved from all difficulty on this head, by the statement in Court of both defendants, who in argument admitted that W. Kidson & Co were hopelessly insolvent, and the Counsel of both took the argument on that footing. Whatever meaning may be attached to the word insolvency in England, there is no doubt of its meaning here, that the assets of a debtor are not sufficient to meet the claims of the apparent creditors. "La déconfiture" says Demolombe: "Des contrats Vol. 2 Art. 666, c'est le passif dépassant l'actif, c'est l'insolvabilité, devenue apparente, du débiteur dont les biens ne sont pas suffisants pour satisfaire les créanciers qui se montrent."

From the admissions made at the bar, we have no doubt that W. Kidson & Co are in

the state referred to in this passage. The question of fact being settled in the affirmative, the next point we have to consider is the legal effect and meaning of the words of the 2003 article of the Civil Code which says *inter alia*; "Le mandat finit par la déconfiture soit du mandat, soit du mandataire."

It is said that these words do not apply to the case of a trader but to a non-commercial person. It is true that in French Law, the word "faillite" is applied to traders, who are unable to pay their way, and the word "déconfiture" to non-traders, whose assets are not equal to their debts. But this objection does not solve the question. The opinion of all commentators place "déconfiture" and "faillite" on the same footing, so far as the duration of mandate is concerned, and the reason is obvious. The same principle, which makes the insolvency of a non-trader put an end to a mandate, leads to the same result when a trader is insolvent. The "Mandat" in both cases has lost all credit and the confidence of his creditors, and by a natural consequence the mandate which he had given for the management of his affairs ceases to operate. If this principle applies to the case of a non-trader, it does so as strongly, if not more so, in the case of a trader. In the case of merchants living away from the place where their business is conducted, it is absolutely necessary that they should have a proxy in order that their contracts and obligations may be validly entered into. And if a state of insolvency arises, so that their credit is gone and the confidence of customers is lost, it is clear that the authority of the merchant, as well as the ordinary individual, must come to an end as soon as that state of matters exists. The commentators seem to be unanimous on the point. See *Troplong, Mandat Art. 2003 Sect. 746, Demolombe Vol. 2 des Contrats Art. 664, Laurent Vol. 28, page 101 Art. : 2, Paul Pont petits contrats Vol. 1 Art. 2003 section 1149.*

It was ably argued by Mr K[ ]Vern for W. Kidson that the validity of this power of Attorney should be judged by the law of England, where it was granted, and that that law did not recognize the recall of mandate by insolvency, but by an actual adjudication of bankruptcy. No doubt there is high authority for so stating the law of England, and the rule thus laid down is a much more certain test than the somewhat loose system of the French Code. If it were possible to entertain this view, the Court would willingly have adopted it. But we cannot admit that the law of

place of the execution of a power of attorney should govern its interpretation when it was to be entirely fulfilled in Mauritius. The deed might be executed in England, & it was to be acted on and all its powers fulfilled here, where the Company itself had carried on business. In contracts of that nature the solution and place of performance of the power, is of more importance, than the mere execution of the deed, and being of opinion that this question of Law must be settled on such authority, we cannot sustain the contention that the Law of England should prevail. We hold then that in consequence of the complete insolvency of the firm W. Kidson & Co in Mauritius, their mandate in favor of J. P. W. Kidson's favor has come to an end.

30. The "Curatelle" is now regulated by Ordinance No. 24 of 1882, which we have carefully read and considered, being of opinion that the question raised is one of very great importance. The enacting clauses of the Ordinance imposing duties on the Curator express these in very wide terms. The sixth section declares that it shall be *inter alia*, "The duty of the Curator to take charge of, and to administer the property of and to represent absentees" and the ninth section in like manner enacts that "whenever there shall be any property moveable or immovable in the Colony the owner of which is believed to be absent from the Colony and is not known to be legally represented therein, such property shall for the purposes of this Ordinance be considered to be unclaimed property." And by Section 7th, Vacant Estates comprise not only vacant successions, but unclaimed property. Attaching an ordinary and plain meaning to these enactments, it is impossible to escape from the conclusion that the property of W. Kidson & Co is in the position pointed at by the Ordinance. It is unclaimed property, the owner of which is absent from the Colony and is not legally represented therein. Their property therefore falls directly under the enacting words of the Ordinance. There is no doubt that they have some property, consisting of their stock in trade which has been seized, and sold, and must be distributed rateably amongst the attaching creditors, and then they have various outstanding claims, a list of which has been made up and is produced amongst the evidence of the plaintiffs. This interpretation is confirmed by various other sections of the Ordinance, from which it appears that the Curator is called upon to consider the various claims of creditors, and to examine the just-

ness of these claims. It is believed to be true and it is within the experience of every judge of this Court, sitting in Chambers, that the Curator of his own accord does not unfrequently take possession of the goods of absconding shop keepers, and the Court sees no difference between the possible duties of the Curator in reference to these Estates, and those which he may be called on to perform in the present instance. But it was contended by the Curator that he ought not to be called on to perform the duties of an assignee or trustee in Bankruptcy. The Court admit the inexpediency of imposing such duties on a public officer like the Curator. But it is to be remembered that here there is no Bankruptcy and there is property in the position contemplated by this Ordinance, and as words in the Ordinance have been used, which fairly interpreted, include the management of the present Estate within the duties of the Curator, it seems impossible to hold that because Kidson & Co are merely insolvent, they are excluded from the operation of the words of the Ordinance. It is true that they might be made Bankrupt, and would then come under the Bankrupt Laws. But till that contingency occurs, the Curator appears to have a duty to perform to such an estate as the present, from which he must not shrink. For some reason or other, a creditor may apply for an adjudication in Bankruptcy against these estates, if not in Mauritius, at least in England, and the assignee or trustee would be entitled at once to ask for and obtain a divesting order; meanwhile the Court see no other alternative than to order a rule to issue in terms of the present application.

### SUPREME COURT

#### CERTIORARI—APPLICATION FOR WRIT—LAW AS TO.

*In this case application was made for a writ of certiorari for the purpose of bringing before the Supreme Court for review, a judgment of the District Magistrate of Port Louis in a matter of unsatisfied judgment.*

*Held that a certiorari does not lie except for defects which are apparent on the face of the record, nor to correct an alleged erroneous appreciation of fact by a Magistrate.*

*As in this case there was evidence in support of the Magistrate's judgment the Court declined the writ with costs.*

RAYAPEN.—Plaintiff

versus

CAPEYRON &amp; DELANGE.—Defendants

—  
Before

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Acting Puisne Judge

E. GALLET,—Counsel for Plaintiff  
F. SIMONET,—Attorney for the same

A. BOUCHERAT,—Counsel for defendant

Record No. 22,535.

25th July 1884.

His Honor Mr. JUSTICE ROUILLARD :

This is an application for a writ of certiorari for the purpose of bringing before us for review, a judgment of the district Magistrate of Port Louis in a matter of unsatisfied judgment. The application is made on two grounds: 1o. Because the Magistrate had not sufficient reason for deciding that the Defendant had disposed of his property in fraud of the rights of his creditors. 2o. Because the defendant has never acted in such a way as to be justly convicted of bad faith."

In order to enable the Court to ascertain at once the facts of the case, the counsel for Rayapen was kind enough to supply the Court with a copy of the evidence and we have been able in consequence to know what took place before the Magistrate.

The law as to certiorari is very simple. A certiorari does not lie except for defects which are apparent on the face of the record of an inferior Court; a certiorari does not lie to correct an alleged erroneous appreciation of facts by a Magistrate. It has been held however that, in cases where there was absolutely no fact or document before a Magistrate, his giving a judgment in the absence of any evi-

dence might be considered as amounting to an error in law, and so a certiorari would lie. The question before us is therefore whether there was any evidence before the Magistrate on which he could found his judgment. In this case the man Rayapen, who was at one time a proprietor of a carriage and horses endorsed a bill for one of his friends in order to enable him to enter into a certain contract, and very soon after he alleges that he disposed of the carriage and horses. There is evidence that subsequently to the alleged sale, the carriage was sent for repairs by Rayapen to a coach maker and under such circumstances as to render it very doubtful whether the carriage belonged to the alleged purchaser or to himself. The facts are somewhat meagre, and it is quite possible that this Court, if called upon to try the case, would not have considered the evidence as clearly indicating fraud, but still there was evidence of fraud before the Magistrate, upon that evidence the Magistrate, found that the defendant had fallen under the provisions of Ordinance No 16 of 1869 and we do not feel authorized to interfere with his judgment.

His Honor Mr. JUSTICE MURE:

The result is that this application for writ of certiorari is refused with costs.

## SUPREME COURT

## LICITATION.—EXERCISE OF RIGHT OF NATURAL DESCENDANTS.

*The applicant is the legitimate daughter of one Frederic Quesy the natural son of Jean Baptiste Quesy.*

*Jean Baptiste Quesy was mentioned in a citation in 1878 as having left no heirs and at which the Government purchased at the Bar a property situate at Plaines Wilhems.*

*The applicant instituted proceedings in licitation against the Government on the ground that she had not been a party to the former licitation.*

*Among other objections the Government contended that the applicant before taking any*

*steps towards the licitation prayed for, ought to have been put in possession of her share in the succession of Jean Baptiste Quessy.*

*the Master upheld the contention of Government in so far as he stayed the proceedings for 3 months in order to enable the applicant to be sent into possession of her rights, and further ordered the applicant to pay the costs of Government.*

*Against this judgment the applicant appeals.*

*The Court maintained the Master's judgment as to the point of law but ordered each party to pay his own costs.*

—  
QUESSY, Appellant

versus

COLONIAL GOVERNMENT, Respondent

—  
Before

His Honor A. MURE,—Puisne Judge

and

His Honor J. ROUILLARD,—Acting Puisne Judge

—  
A. HUGUES,—Counsel for Appellant  
T. NICOLAS,—Attorney for the same

JOHN M<sup>c</sup> DOUGALL GIBSON, Substitute Procureur General—Counsel for Respondent  
J. GUIBERT,—Attorney for the same

—  
Record No. 22,344

31st July 1884

On the twelfth day of August eighteen hundred and seventy eight, the Colonial Government purchased at the bar of the Master's Court, on a licitation between the natural children of one Theoliste Mayot, a property situate in the district of Plaines Wilhems.

In the proceedings in licitation one Jean Baptiste Quessy was mentioned as having died without issue, and his property was held to have devolved on several natural brothers and sisters who were already parties to the licitation.

On the 22nd January 1883, Louise Quessy the present appellant, the legitimate daughter of one Frédéric Quessy deceased, who was the natural son of Jean Baptiste Quessy, instituted proceedings in licitation against the Colonial Government, her ground of action being that she was not a party to the former proceedings in licitation.

The validity of the proceedings for the second licitation was impugned by the Government on two grounds:—1o. that Louise Quessy was not a co-owner of the plot of ground above referred to; 2o. that she ought before suing the licitation, to have obtained from the Supreme Court, the cancellation or annulment of the judgment of adjudication before mentioned.

The second ground for cancellation was rejected by the Master, and after inquiry the filiation of Louise Quessy does not seem to have been disputed, but in the course of the proceedings it was discovered that Jean Baptiste Quessy, the grandfather of Louise Quessy, had married at Seychelles and had died there leaving a posthumous legitimate heir, Laurent Virgile Quessy, who had died in infancy leaving collateral legitimate heirs.

The objection was then taken by the counsel for the Government that, in terms of article 724 of the Civil Code, Louise Quessy, before taking any steps towards the licitation prayed for, ought to have been put in possession of her share in the succession of Jean Baptiste Quessy.

The acting Master, by his judgment dated 19th February 1884, upheld the contention of the Government, in so far as he stayed the proceedings in licitation for three months, in order to enable Louise Quessy to be sent in possession of her rights in the succession of Jean Baptiste Quessy, (the judgment says Frédéric Quessy, but this is evidently an oversight) and the acting Master further ordered Louise Quessy to pay the costs of the Government.

Against this judgment appeal was made, and it is contended, in the first place, that no

*envoi en possession* was required previous to Louise Quessy beginning the proceedings in licitation; so that, even supposing the Court to be of opinion that an *envoi en possession* is necessary, the acting Master was wrong in giving costs to Government.

It was contended on behalf of the appellant, that natural heirs had right in the succession of their author, a *jus in re* independently of any legal formality to be fulfilled by them, a right which they would transmit to their own heirs, that there was no enactment of the law which prevented their exercising their rights, and that the formality of the *envoi en possession* was only necessary to enable them to receive eventually the share to which they were entitled in the succession claimed.

This interpretation of article 724 of the Civil Code, plausible as it may look at first sight, is not supported by the various authors who had commented on that article, nor does it rest, as it seems, on any authoritative decision of the French Courts.

It is now generally admitted that natural children have not merely a claim or *créance*, to be exercised against the legitimate heirs holding the succession of the deceased, but a real share in the estate, and that in certain sense, they may be held to have succeeded to that estate, and so far the contention of the appellant is correct; but although the commentators agree about the nature of the rights of *successeurs irréguliers*, there seems to be a *consensus* of opinion that those rights cannot be actively exercised before the irregular successors have been recognised by the heirs having the *saisine*. The *envoi en possession* is the formality which has the effect of assimilating the position of those *successeurs irréguliers* to that of the other heirs.

*Demolombe, Successions, vol. 1, § 155, says as follows:—*"Les auteurs du Code Napoléon ont voulu, ainsi que nous l'avons dit, que les successeurs irréguliers ne puissent prendre possession effective de l'hérédité qu'après avoir fait connaître leur titre." And, in the following paragraph, as a consequence of the above proposition, he gives his opinion that before the *envoi en possession* has been effected, the *successeurs irréguliers* cannot exercise any of the actions arising out of the succession, nor sue the debtors thereof. *Laurent, vol. 9, art. 217 et seq.*, holds the same opinion. (See also *Mourlon on art. 724 C. C.*)

According to the same authors, although the *successeurs irréguliers* cannot actively interfere in the management of the succession, they can take certain conservancy measures, for instance, they may be present at an inventory, or even request that it should be made, but, surely the licitation of an immoveable property cannot be viewed as a *mesure conservatoire* without which the rights of the parties interested might be endangered.

There is, however, a mention made in *Dalloz paragraph 397 verbo successions* of a decision of a French Court which is to the effect that a *demande en partage* may be begun before the *envoi en possession* is obtained, but this decision is not reported in the collection of *Sirey*, nor is it to be found in *Dalloz*, and whatever weight might be attached to this decision if properly before us, we have found, in our experience, that it is not always safe to trust to a mere dictum summarising a judgment.

We have therefore come to the conclusion that the Master was so far right when he stayed proceedings for the purpose of enabling the parties concerned to obtain a proper standing before his Court. But, on one point we think that he erred, namely when he gave costs to the Government. It must be borne in mind that the Government had failed in the main point of its contention which is that Louise Quessy ought to have applied to another Court in order to obtain the cancellation of the former licitation, before instituting the present proceedings before the Master. The incident in which the decision appealed from was given, is one which arose during the progress of the trial, and was not in any degree raised by the Respondent, except in as far as the Government took advantage of certain facts unexpectedly revealed before the Master.

Under the circumstances, it is difficult to see on what ground Government obtained costs as a successful litigant. If the Government had been ordered to pay its own costs it would have had equitably no ground of complaint, we shall therefore vary to that extent the judgment of the acting Master, and remit back the case to be proceeded with according to law.

Each party paying his own costs of the appeal.

## SUPREME COURT

PEAL. — EMBEZZLEMENT. — CONVICTION  
QUASHED AS THE PROOF OF CRIMINAL  
INTENT WAS WANTING IN THE RECORD.

*is is an appeal from a Judgment of the  
District Magistrate of Port Louis con-  
demning the Appellant to two months im-  
prisonment upon a charge of embezzlement.*

*the Court held that there was no proof in  
the Record of criminal intention or of the  
crime of embezzlement, and that the case  
resolved itself into a question of civil dis-  
pute between the parties. Conviction quashed.*

VICTORIEN,—Appellant

versus

QUEEN,—Respondent.

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor FREDERIC CONDÉ WILLIAMS,—

Puisne Judge.

DANIEL JENKINS,—Counsel for Appellant.  
EDGAR VAUDAGNE,—Attorney for the same

JOHN M<sup>c</sup> DOUGALL GIBSON Substitute Procu-  
reur and Advocate General,—Counsel  
for Respondent

JULIUS GUIBERT,—Attorney for the same.

Record No. 515.

4th August 1884.

HIS HONOR MR. JUSTICE MURE :

We do not think it necessary to take the  
papers in this matter into consideration, we  
have both of us read the evidence and given  
it as much consideration as we think neces-  
sary for the determination of the case.

It appears that the appellant was charged  
before the Magistrate with embezzlement, and  
no doubt there is a good charge of embezzle-  
ment in the Information and a well conceived  
charge of embezzlement under the 333rd  
article of the Penal Code. The man was  
convicted under that article and sentenced to  
two months' imprisonment, from which sen-  
tence he appeals.

The charge appears to be that he received  
a sum of Rs 100 for the purpose of buying  
barrels to be delivered to Mr. Sumeire and  
it is alleged that he applied that Rs 100 to  
his own purposes, it having been given to  
him for a special purpose. If that case were  
proved of course I think it would be a good  
conviction, but the first remark we have to  
make is that undoubtedly the evidence on  
the record is very scanty. There were trans-  
actions apparently between the parties ; so far  
as we see these transactions began on the 16th  
or 17th of April.

The next part of the matter is the produc-  
tion of a receipt which bears that on the 19th  
of April Rs 100 was given to this man, and  
on the 22nd April another Rs 100 was given  
to him in order to buy barrels on account of  
Mr. Sumeire.

I think it is upon Mr. Sumeire's evidence  
that this question should be determined ;  
Sumeire says : " I am a trader, I know ac-  
cused, some time ago on the 22nd of April  
last, I gave him Rs 100 to buy barrels with  
it, he went away and since I did not hear  
of him, I produce in evidence the receipt  
of accused." We have no explanation  
about the first Rs 100, there is not a word  
said about it in Mr. Sumeire's evidence, but  
he produces the receipt which bears he gave  
it, " since I gave accused the money I saw  
him once and he said he would come and  
settle with me, I never saw him." I sup-  
pose that means : " I never saw him again."  
In cross examination he says : " I received no  
barrel after the 22nd April last " but he  
does not say that he has not received Rs 200  
worth of barrels before the second date, and  
it seems to us that that is a necessary part of  
the evidence of embezzlement which should  
have gone to the judge for his consideration.  
If we take the evidence simply as we have it  
upon the Record, which we are bound to do,  
it is the opinion of the Court that this matter  
resolves itself into a simple question of ac-  
counting between the parties, and that it does  
not raise really proof of criminal intention on  
the part of the accused, and therefore if there

is no proof of criminal intention there is no evidence that should go to a jury, or in other words there is not sufficient evidence to justify the Magistrate in coming to the conclusion that there was a case of criminal contravention for which the accused ought to have been convicted. We are confirmed in this when we see that the first transaction took place on the 6th or 17th of April, the first Rs 100 is advanced on the 19th and the next Rs 100 is advanced on the 22nd and so far as we can judge that seems to be the whole that took place between the parties. There is evidence that 70 tierces were at the request of the accused sent to the "Albion Dock" of which the plain iff, is the manager, and there is the much more positive evidence of the second witness for the defence as to the reception of them. "I remember taking barrels at the request of accused to the Dock, that took place long ago, I do not remember the date or the month." If the transactions between the parties began, as I have said and as appears in this record, only on the 16th or 17th of April, there were four days in which to cart the barrels which were taken over by Mr Sumeire, — as we find that there are essential defects in the evidence of Sumeire himself, if we were to take this evidence along with it we think that there is really no proof whatever of criminal intention, and no proof of the crime of embezzlement, but that the matter resolves itself into a question of civil dispute between parties.

For those reasons we are of opinion that the conviction should be quashed.

### SUPREME COURT.

#### COSTS OF CURATOR OF VACANT ESTATES.

*In this matter the Commercial Bank moved that the Curator of Vacant Estates should be sent into possession of the Estate of W. Kidson & Co. The motion was resisted by the Curator, but the Court ordered the Curator to take possession of the Estate.*

*The Curator moved that his costs should be paid out of the Estate.*

*The Judgment of the Court is: that the costs of the Commercial Bank be paid out of the Estate of which the Curator is to take pos-*

*session, but that the Curator & W. Kidson representing W. Kidson & Co. should not bear their own costs.*

#### THE MAURITIUS COMMERCIAL BANK.—Plaintiff

versus

J. J. BROWN & ANOR.—Defendants

Before

His Honor A. MURE.—Judge

and

His Honor J. ROUILLARD.—Acting Judge

P. L. CHASTELLIER,—Counsel for plaintiff  
A. J. COLIN,—Attorney for the same

JOHN MC. DOUGALL GIBSON, The Solicitor  
Procureur General,—Counsel for defendant  
J. GUIBERT CROWN,—Attorney for the same

V. K. VERN,—Counsel for Kidson  
A. ROHAN,—Attorney for the same

Record No. 22,485.



#### JUDGMENT OF HIS HONOR J. ROUILLARD

4th August 1884.

The Court rules that the costs of the plaintiffs having been made in the interest of all the creditors of W Kidson & Co shall be paid out of the Estate of which the Curator is about to take possession of in virtue of the judgment of the Court.

The Curator of Vacant Estates & William Kidson representing W. Kidson & Co, shall each of them pay their own costs respectively.

JUDGMENT OF HIS HONOR A. MURE

4th August 1884

In giving this judgment I think it right to point out that the Curator of Vacant Estates moved for his costs out of Estate, but there is a great difference in the position of the Curator of Vacant Estates under the recent Ordinance, and under the former law. Formerly he was entitled to employ his own Counsel and agent, and he frequently had to raise questions of an important character, in which it might be contended that he had acted in the public interest, and it was right that the private agent should receive his expenses. At the present moment the position of matters is quite different, in the first place there is an ordinance under which the Curator of Vacant Estates is placed under the recent ordinance and under the Control and direction of the Procureur General, and he is directed to employ the Government attorney in all his litigations. In the second place we have an ordinance appointing a Government attorney and fixing his remuneration, and that ordinance especially provides that when he engages in litigation and has a finding of costs in his favor, the amount shall be paid over to the Receiver General.

Now looking to the condition of the fact here, the Court does not think that this is a case in which the Curator of Vacant Estates having litigated unsuccessfully, is entitled to have his costs out of the Estate. The result would simply be that the Receiver General would receive the costs as well as the five per cent which he is entitled to take out of every Estate, in virtue of the provisions of the Ordinance.

SUPREME COURT

APPEAL AGAINST DECISION OF BENCH OF MAGISTRATES.—SENTENCE OF 3 YEARS FOR LARCENY REDUCED TO TWO YEARS. — § 305 P. C. § 15 OF ORDINANCE 3 OF 1883.

*In this matter the Court held that the limit of imprisonment that can be inflicted by a Bench of Magistrate under Ordinance 3 of 1883 is two years with or without hard labor.*

LARREGAIN,—Appellant

versus

QUEEN,—Respondent

Before

His Honor A. MURE,—Puisne Judge

and

His Honor F. C. WILLIAMS,—Puisne Judge

A. HUGHES,—Counsel for Appellant  
T. NICOLAS,—Attorney for the same

J. M. GIBSON, Substitute Procureur General,  
Counsel for Respondent  
J. GUIBERT,—Crown Attorney, Attorney for the same

Record No. 506.

6th August 1884.

In this case the Appellant was convicted by two Magistrates, under § 305 of the Penal Code, of larceny with aggravated circumstances, and he was sentenced under § 15 of Ordinance No. 3 of 1883 (the law which constituted the Court) to three years imprisonment.

Several objections to this conviction are taken on behalf of the appellant, but the objection upon which, in our view, the intervention of this Court should be based, is that under section 15 a sentence of imprisonment by the Court below is limited to two years, whilst three years is the limit of a sentence for penal servitude, a punishment as yet unknown to our penal system.

There is no doubt, consequently, that the Court below has passed a sentence in excess of the letter of its jurisdiction, and, under ordinary circumstances, we should be disposed to quash the conviction upon that ground. But under the extraordinary circumstances presented by the wording of Section 15, which prescribes a punishment unknown to our system, and under our strong feeling that a serious miscarriage of justice would result



were this conviction quashed altogether, we think that we may extend our powers of amendment to an alteration of the sentence passed in this case from three to two years imprisonment. It is to be for the future distinctly understood, however, that in the view of this Court, the limit of a sentence of imprisonment that can be passed by the Court constituted by Ordinance No. 3 of 1883, is two years with or without hard labour.

### SUPREME COURT.

**WRIT OF MANDAMUS.—LAW AS TO MASTER AND SERVANT IN DEPENDENCIES.—ORDER IN COUNCIL OF 7TH SEPTEMBER 1838.—ORDINANCE 15 OF 1852—41 OF 1875 AND 12 OF 1878.**

*This is an application for a writ of Mandamus to compel the Stipendiary Magistrate of Port Louis to take cognizance of a case in which the heirs Muratorio claimed wages due to the late Félix Muratorio as Overseer of Jean de Nova, a dependency of Mauritius.*

*The Magistrate contended that he had no jurisdiction as the only laws under which he might have heard the case were the Order in Council of 7th September 1838 and Ordinance 15 of 1852, both of which had been repealed by Ordinance 12 of 1878, and that the latter Ordinance had not been extended to the Dependencies.*

*The Court held that the Magistrate was right and refused the writ.*

**HEIRS MURATORIO.—Plaintiff**

*versus*

**THE STIPENDIARY MAGISTRATE OF PORT LOUIS.—Defendant**

Before

His Honor E. J. LECIÉZIO,—Chief Judge

and

His Honor J. ROUILLARD.—Acting Puisne Judge

W. NEWTON.—Counsel for plaintiff  
H. BERTIN,—Attorney for the same

J. MC. DOUGAL GIBSON, Substitute Procureur General,—Counsel for Crown  
J. GUIBERT, Crown Attorney,—Attorney for the same

The Defendant appearing in person.

Record No. 22,528

19th August 1884.

This is a motion for the issuing of a writ of Mandamus to compel the Stipendiary Magistrate of Port Louis to take cognizance of a case lately pending before his Court between the Heirs Muratorio as plaintiffs and Hall and others as defendants for the recovery of the wages alleged to be due by the defendants, the owners of the Island Juan de Nova, to the late Jules Félix Muratorio as the overseer of the defendants in charge of the said Island, at the rate of Rs 80 per month from the first December 1882 to 5th April 1883, in which matter the Magistrate considered, on the 10th July last, that he has no jurisdiction.

The learned Magistrate appeared in person and explained that, although by article 10 of Ordinance 41 of 1875, the Stipendiary Magistrate of Port Louis formerly had jurisdiction to deal with breaches of the Stipendiary law committed in the minor dependencies of Mauritius, one of which is Juan de Nova, when one of the parties happened to be in Mauritius, he considered that he no longer had such jurisdiction, because the royal order in Council of the 7th September 1838 and Ordinance No. 15 of 1852, which are the two laws referred to in article 10 and which he had to apply, had been repealed without any reservation by Ordinance No. 12 of 1878 and that the latter Ordinance had not been extended to Juan de Nova. He also stated that the matter brought before his Court was not one between servant and master as allowed by Article 10 of Ordinance 41 of 1875, but one between an overseer and his employer and that Ordinance 31 of 1867 now also repealed by Ordinance 12 of 1878, which assimilated an overseer to a servant for the purpose of recovering his wages or salary, had never been extended to Juan de Nova, so that even admitting the Royal Order of 1838 and Ordinance 15 of 1852 to be still in force at Juan de Nova, he had no jurisdiction to try the case brought before him.

The learned Counsel for the applicants contended that Art. 10 of Ordinance 41 of 1875 had not been repealed, and that the Stipendiary Magistrate of Port-Louis had still jurisdiction to hear complaints between Master and Servant, and that the word *servant* used in that Ordinance had then the extended meaning given to it by Ordinance 31 of 1867, he added that it is the law of Mauritius such as it exists now that is to be applied, and quoted in support of that theory the decision of the Court in *R. v. Charles and Célécourt*, Sauzier's Reports 1881, page 138.

The Substitute Procureur General submitted that Article 10 of Ordinance 41 of 1875 might be considered as being repealed, being inconsistent with and repugnant to Ordinance 12 of 1878 which has repealed the Royal Order of 1838 and Ordinance 15 of 1852; and abided by our decision. We have examined with care the several provisions alluded to in the course of the discussion before us, and we think that the Magistrate was right when he declared that he had no jurisdiction to try the matter brought before him.

In the first place the jurisdiction of a Stipendiary Magistrate is quite special and has been created by our local law for a well defined purpose; it must be considered as an exceptional jurisdiction taking away from the ordinary Courts certain cases which otherwise would be tried by them.

It is clear from the wording of article 10 of Ordinance 41 of 1875 that the jurisdiction given by it to the Stipendiary Magistrate of Port Louis was for the hearing of complaints brought for any offence or breach of the law committed in certain Islands and mentioned in the order in Council and in Ordinance No. 15 of 1852. The laws which he had to apply were those two laws and if they have been repealed, and if no other law has been extended to these Islands, we fail to see how his jurisdiction can still exist. It was argued on behalf of the applicants that according to the latter part of article 10, the Magistrate was to deal with the offence according to the provisions of the laws of Mauritius applicable to such offence, and in the same way as if the said offence had been committed in Port Louis and that as a consequence the law now in force in Port Louis, is the law to be applied by the Magistrate. We do not think that this is a sound construction of article 10 when read as a whole, for the legislator could not have meant that complaints were to be brought for the offences mentioned in the

order in Council and in Ordinance 15 of 1852 which were the Stipendiary laws in force then, and that other laws might be applied in dealing with those complaints. The decision in *R. vs. Charles and Célécourt* which has been quoted in support of that interpretation does not appear to us to be in point. The question which arose in that case was different; Article 25 of Ordinance 10 of 1850 enacts that when any question may arise as to any procedure, or conduct in, or respecting any matter, in the trial by jury, not herein before provided for, the law of England shall be followed and rule the question at issue; and a majority of the judges held that the law of England to be applied is the law as it stands at the date when reference is made to it. In the present case the enactment we have to deal with (Article 10 of Ordinance 41 of 1875) is not general in its terms as Article 25 of Ordinance 10 of 1850 is, it refers not to the general law of Mauritius on a certain matter, but to particular laws which are mentioned specially, namely: The royal order in Council and Ordinance 15 of 1852, and, as they have been repealed without any reservation, we must hold that the Stipendiary Magistrate of Port Louis, who had jurisdiction only for the purpose of applying them in matters of breaches or offences committed in the minor dependencies, has no longer any such jurisdiction and that his powers are extinct.

Being of that opinion we do not think it necessary to examine the subsidiary points which were argued in this case, and we refuse to issue the writ prayed for.

## SUPREME COURT

**LOSS OF AN ACCEPTED ACCOUNT.—PROOF OF ITS EXISTENCE BY BOOKS OF DEBTOR.—BOOKS MAY BE RECEIVED IN EVIDENCE THOUGH NOT "COTÉS, VISÉS ET PARAPHÉS" ACCORDING TO ARTICLE 11 OF THE CODE DE COMMERCE.**

*This is an appeal from a judgment of the Senior District Magistrate in an action entered by the appellant against the respondents to recover the amount of an accepted account which had been mislaid.*

*The appellant proposed to prove the existence of the accepted account by the Respondent's books. To this the Respondent objected:*

16. *Because contrary to the provisions of article 11 of "Code de Commerce" they were not "cotés, paraphés et visés."*

20. *Because the Respondents' Books did not make any mention of the accepted account.*

*The magistrate ruled in favor of the Respondents whereupon the appellant offered to produce another Book shewing mention of the accepted account.*

*On this point the Magistrate apparently gave no decision.*

*The Court held that inasmuch as art 11 of the Code de Commerce cannot be complied with under present circumstances, the Book should be received in evidence, that the entry in the Books of a sale of goods on 11th January to Respondent with guarantee as in accepted account, would not constitute a sufficient proof of the existence of an accepted account payable to order on 26th March, but as appellant offers other proof he should be allowed to produce it.*

*Case remitted back to Magistrate.*

*Half the costs allowed to appellant.*

—  
ESSA ABOO,—Appellant

versus

ANNEE & OTHERS,—Respondents

—  
Before

HIS HONOR EUGÈNE JULES LECLÉZIO,—Chief Judge

and

HIS HONOR JOHN ROUILLARD,—Acting Puisne Judge

—  
VICTOR KIVERN,—Counsel for appellant  
EMILE SAUZIER,—Attorney for the same

—  
PIERRE LÉONCE CHASTELLIER and OCTAVE LAURENT,—Counsel for respondent  
EUGÈNE LAURENT,—Attorney for the same

—  
Record No. 812.

19th August 1884.

The appellant, who was Plaintiff before the District Court of Port Louis, sued the

two Respondents, Annee and Ah-Kee & Co. under the following circumstances :—

In the plaint lodged by the appellant, it is alleged that Annee, on or about the eleventh January last, purchased from Plaintiff certain goods to the amount of Rs. 991.50 c. for which an accepted account, payable to the Plaintiff or order, and guaranteed by Ah-Kee & Co. was given, the date of payment being the 26th March following.

It is further alleged that, before its coming to maturity, the said account was mislaid by appellant who, after giving security to the satisfaction of the then Senior District Magistrate obtained from him an ex-parte order commanding the Defendants to pay to the Plaintiff the amount of the accepted account.

The order not having been complied with, the Plaintiff prayed for a judgment condemning the Defendant to pay to the plaintiff the amount of the accepted account.

At the hearing of the case before the District Court, the plaintiff proposed "*in fine litis*" to examine Ah-Kee on his personal answers with a view to proving the existence of the missing accepted account. To this, the Counsel for Ah-Kee objected, on the ground that, under Art. 152 of the Code of Commerce, the only mode by which the ownership of the missing document could be proved, was by producing the books of Plaintiff. The objection being upheld by the Magistrate, some books of Plaintiff were accordingly produced, and then objection was taken to the books being received as evidence on two grounds 1o. Because, contrary to the provisions of Article 11 of "*Code de Commerce*" they were not "*cotés, paraphés et visés*" 2o. Because the books produced by the plaintiff did not make any mention of the accepted account. On this objection, and, apparently on the two grounds put forward, the learned Magistrate ruled in favour of the Defendants. Whereupon the Counsel for the Plaintiff moved for a postponement in order to enable him to produce another book showing the mention of the accepted account.

The Magistrate does not appear from the Record to have given any decision on this last application, but as he had already held that no traders' books could be admitted in evidence unless they were "*visés*" "*cotés et paraphés*", it must be supposed that the additional books which the Plaintiff proposed to produce would have been, on the same

principle, rejected. Judgment having been given for the Defendants, appeal was made to this Court, and the reasons of appeal embody the various rulings of the Magistrate as above set forth. Another ground of appeal was put forward namely; that article 152 of the Code of Commerce did not apply to accepted accounts even when made payable to order, but this point was not pressed before us. With reference to the first question raised before the Magistrate, there cannot be any doubt, in presence of the express provisions of Article 152 of the Code of Commerce, that the proof of the existence of a bill of exchange or other negotiable instrument, when the document has been mislaid, must be supplied by the books of the plaintiff; on this point the jurisprudence of the French Courts and the authors who have commented on the "Code of Commerce" are unanimous (see S. V. 1863. 1.341). Then comes the next question. Is it the only mode of proof allowed by Law? for cases may occur which, although very strong evidence appears in the books produced, tending to show the existence of a bill of exchange or promissory note, there may not be a complete proof. Here again the general opinion amongst the commentators of the "Code de Commerce" is, that the modes of proof allowed in commercial matters may be resorted to for the purpose of corroborating and strengthening or contradicting the statements contained in the books of a trader (see Alauzet on Art. 152, also note to S. V. 1863.1. 341.) The Magistrate was therefore right in insisting in the first place on the production of the books. But it is necessary that the books of traders in this colony should be, according to article 11 of the "Code of Commerce" *cotés, visés et paraphés* in order to render them receivable as evidence before a court of justice in favor of the party producing them? On this important question, before this Court and before the District Magistrate, long and exhaustive argument was heard in support of the views held by the respective parties, and the argument subsidiarily involved two delicate questions, namely, 1o. Whether a law can be held to have fallen into "*désuétude*", as it is contended that it was the case with the article of the "Code de Commerce" above referred to. 2o. Whether a usage of trade can supersede a formal enactment of the law. Our decision on the main question raised renders it unnecessary that we should express any opinion in these two last points. We think that article 11 of the Code de Commerce has by virtue of changes in our judicial organisation, become inapplicable, or in other words obsolete.

In terms of the article above referred to, the books of traders must be "*cotés, visés et paraphés*" but by whom is this formality to be performed? The article says, by one of the Judges of the Tribunal of Commerce or by the Mayor or "*Adjoint*".

Now at the time of promulgation in this Colony of the "Code de Commerce," in 1809, there were neither "mayors nor adjoints." True in 1849 a municipality was created, but it included only the town of Port Louis, and on referring to Ordinance No. 21 of 1851 by which the powers and duties of the mayor and municipal Council are defined, it is easy to find (art: 28 & seq.) that the functions of the Mayor and of his Councillors are confined to the good keeping and in certain respects to the Police of the town, and these functionaries cannot be assimilated to the Maors under the French system, who, being, to a great extent the agents of the executive, are also officers of the Civil Status and have other functions to fulfil. As for the Court of First Instance, the judges of which in virtue of Art. 64 of the Code of Commerce, were to fulfil the functions of judges of the Tribunal of Commerce, it was abolished by the order in Council, of 23rd October 1851 and whilst, by virtue of Art. 1 of the aforesaid order in Council, the court of appeal became "The Supreme Court of the Colony of Mauritius" and by article 8, Districts Courts were established having "Civil and Criminal jurisdiction", in such cases and matters and to such extent as shall be ordained and fixed by a special Law, there is no enactment transferring to any Court the powers and duties formerly vested in the Court of First Instance, except that, in ordinance No. 24 of 1855, it is stated that all matters upon which a judge's order or authority was formerly required from the President of the Court of First Instance.... and all matters which were settled at chambers by the President of the Court of First Instance, are within the competence of the judge at chambers. But this enactment refers obviously to judicial matters only. It was stated by the learned Counsel for the Respondents, who spoke from information supplied to him by one of the senior members of the legal profession in the Colony, that previous to the promulgation of the order in Council of 1851, books of traders were "*cotés, visés et paraphés*" by one of judges of the Court of First Instance. But the facts that these books were never presented to the judges of the Supreme Court to be initialled &c., is a strong

practical argument in favor of the contention of the appellant.

We hold therefore that, inasmuch as the formalities required by article 11 of the "Code of Commerce," cannot be fulfilled under the present circumstances, the absence of the conditions required by the above article cannot be a cause for not admitting those books in evidence, if they otherwise appear to have been properly and regularly kept. Whilst so far holding an opinion different from that expressed by the Magistrate, we agree with him that the entry in the books of the Plaintiff, referring only to a sale made on the eleventh January last, of certain goods, to one of the Defendants, with the guarantee of the other, does not constitute a sufficient proof of the existence of an accepted account made payable to order on the twenty sixth March following. But as the plaintiff, now appellant, then and there offered to produce an other book, in which mention was made of the accepted account, it seems to us that he ought to be allowed to supply that proof, especially, as in the course of this trial, points of law have been raised, for the issue of which the plaintiff might not have been quite prepared. We shall therefore remit the case to the Magistrate to be proceeded with in the way above pointed out by us, and we shall give to the Appellant half the costs of the present appeal.

### SUPREME COURT

*In this case the Court held that a recognizance entered into to keep the peace in consequence of threats of bodily injury is not forfeited by a conviction for the use of abusive language unaccompanied by further threats or violence.*

PUREN,—Appellant

versus

THE CHIEF CIVIL COMMISSIONER  
OF SEYCHELLES,—Respondent.

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—  
Puisne Judge

O. LAURENT,—Counsel for Appellant  
E. LAURENT,—Attorney for the same

JOHN MC DOUGAL GIBSON,—Substitute Procureur and Advocate General,—Counsel for Respondent

J. GUIBERT, Crown Attorney,—Attorney for the same.

Record Number 813.

21st August 1884.

The main question to be decided in this appeal is whether a recognizance entered into to keep the peace, in consequence of threats of bodily injury, is forfeited by a conviction for the use of abusive language unaccompanied by further threats or violence. The defendant in the Court below and appellant here was, on the nineteenth day of September eighteen hundred and eighty three, bound over, with another who had been using threats of personal violence towards one Dr. Lepper, to keep the peace for six months towards that individual. It is true that the law of this Colony, unlike that of England, makes no distinction between a recognizance to keep the peace and a recognizance for good behaviour. The only surety mentioned in § 136 of Ord. No. 34 of 1852 is a surety for "peace and good behaviour" but although, as is pointed out by an English writer, the surety for good behaviour is a more comprehensive form than the other, as it may be held to cover any breach of the peace, it is a point in this case that the form of recognizance entered into by the appellant was to "keep the peace" only, the alternative term used by our Ordinance being omitted.

This certainly lends some colour to the argument that the bail bond in this case was not intended to be a bond for general good behaviour, but a specific guarantee against the carrying out against Dr. Lepper's person of the threats complained of. That such was the intention of the Magistrate in ordering the recognizance to be entered into is further apparent to us from his remarks made at the hearing of the case on September 19th 1883, as we find them in the record. He said: "The parties are not prosecuted for any crime under the Penal Code but only for threatening Dr. Lepper and they are not called upon to be either fined or imprisoned, but simply to be bound over to keep the peace towards Dr. Lepper in a certain amount."

This intention found its exact expression in the terms of the recognizance; we could not go so far as to say that abusive language can under no circumstances be held to involve a breach of the peace, but under ordinary circumstances it seems to us that, as Archbold remarks (Justice of the Peace 6th Edition p. 1393) "words of mere anger will not amount to a forfeiture of a recognizance to keep the peace" and we think that, in this case the fact, that the appellant five months after the bond was entered into, and under circumstance of great excitement called Dr. Lepper a "damned rascal" in the street, without any offer or show of violence or threat, and without any aggravating circumstance, none being proved, while it justified his conviction before the Magistrate for the public use of abusive language calculated perhaps to *provoke* a breach of the peace, was not in itself such a breach, and certainly not such a breach as was contemplated in exacting the recognizance of the nineteenth September 1883.

The judgment of the Acting District Judge of Seychelles of the first May eighteen hundred and eighty four, declaring the bail bond forfeited and condemning the appellant in the amount of one thousand rupees with costs, is consequently reversed and set aside with costs.

### SUPREME COURT

CLAIM OF A DEBT.—PRESCRIPTION—"COMMENCEMENT DE PREUVE PAR ÉCRIT."

*The Plaintiff claimed a sum of Rs 2109.04 from the Defendant, being an alleged debt due by the Defendant's late father.*

*By an interlocutory judgment the Court found that the debt had been prescribed but that an alleged acknowledgment of the debt would if proved have interrupted the prescription, further that a letter produced was a commencement de preuve par écrit.*

*On resumption of the case the Defendant was heard on her personal answers.*

*The Court decided that the debt claimed by the Plaintiff is prescribed and that the alleged acknowledgment thereof has not been proved—and dismissed the action with costs.*

CORDOUAN,—Plaintiff

*versus*

SCHNEIDER & wife,—Defendants

—  
Before

His Honor A. MURE,—Puisne Judge

and

His Honor J. ROUILLARD,—Acting Puisne Judge

—  
Y. JOLLIVET,—Counsel for Plaintiff  
A. L'HOSTE,—Attorney for the same

V. DELAFAYE,—Counsel for Defendants  
G. KÖENIG,—Attorney for the same

—  
Record No. 22,268

21st August 1884

By an interlocutory judgment delivered by the Court on the 23rd May last it was found by the Court:—

1o. That the claim of Rs 2,109.04 which represents the plaintiff's share as one of the heirs of his late father of a sum of Rs 8,436.16, alleged to be due by the late Mr Pellegrin, the defendant, Mrs Schneider's father, to the plaintiff's father, had undergone the long prescription of 30 years, but 2o. that an alleged acknowledgment or *reconnaissance* of the debt in 1864, which if proved, would have interrupted the prescription could, under article 2248 of the Civil Code, be proved according to the rules governing the mode of proof in all ordinary matters and 3o. that the letter then produced was a *commencement de preuve par écrit*.

On the resumption of the case the plaintiff called the defendant Mrs Schneider on her personal answers and adduced himself and his brother in law, St. Felix, as witnesses. As might have been expected from one who was a mere child in the year 1864, Mrs Schneider's statement amount to a *nihil noris* so far as positive acknowledgment of the debt is concerned, but she makes one important statement to this effect:—"My father always said to me he was indebted to no one, he told me so shortly before his death."

Again the plaintiff's evidence does not bear upon the fact of acknowledgment of the debt within the years of prescription, but merely speaks to the fact that his father sometimes requested his mother to write letters for him, and that he overheard a conversation between his father and mother to the effect that Charles Pellegrin owed money to his father. When this conversation took place is not spoken to, and it is apparent that it is not and cannot be evidence of an acknowledgment of the debt by the debtor. He speaks to no conversation with Charles Pellegrin himself. The evidence of St. Félix merely mentions the time and place when and where the documents founded on by the plaintiff were discovered.

These being the additional facts which have been proved since the case was formerly before the Court, it is apparent that the question between the parties mainly rests upon the interpretation of these documents, formerly in process, coupled with an additional letter of 16th May 1864, which has been recently produced. The Court is of opinion that the plaintiff's case has not been improved by the additional evidence, oral and written.

In the oral part of the evidence the only important fact brought out is that the late Mr Pellegrin did not consider himself in debt to any one, and that was stated shortly before his death.

As this was said after the years of prescription had run, it follows that the debt now claimed, which at the time he spoke had prescribed, was one which he did not think was due by him. In reference to the documents themselves, it must be remembered that the commentators hold that the acknowledgment of the debt must be clear, precise and indefinite, i. e. it must refer specially to the debt the prescription of which it obviates. Looking to the letter first in date, that of 3rd May 1864 the Court have already held that though there was no direct admission of this debt and that the language was ambiguous, some expressions pointing to the fact that the debt was due not to Cordouan himself but to his wife, while other expressions in the letter led to the inference that it was a personal debt of the writer. The Court having formerly determined that this letter might be a *commencement de preuve par écrit* they cannot interpret the letter otherwise now, and certainly it does not by itself contain the acknowledgment required by law.

Nor, if it be coupled with the letter of 16th May 1864, is the position of matters improved for the plaintiff, for that letter begins by saying that the demand of Cordouan the father is most unjust, as he had derived every advantage from the affair of Stanley, while the writer himself had derived none; it goes on to mention several counter claims which the writer might have had against Cordouan but which he has never demanded or insisted on, and concludes by saying, since he had abandoned these, it was the duty of Cordouan to abandon his claim.

The Court sees in this not an acknowledgment but a repudiation of indebtedness. This letter does not increase, but diminishes the value of any favorable deduction that might be drawn from the former letter.

The judgment of the Court is that the debt claimed by the plaintiff is prescribed and that the alleged acknowledgment has not been proved. The action is therefore dismissed with costs.

### SUPREME COURT

CLAIM FOR LOSS OF A HULK—HIRE—VALUE OF PLANT, TOOLS AND MATERIALS—RESPONSIBILITY OF PERSON HIRING,

*In this matter three actions were entered by the Plaintiff under the following circumstances.*

*On the 12th October 1883 the Defendant by a deed under private signatures hired for the sum of Rs 1,000 which was paid cash the hulk "Mars" to raise a sunken vessel the "Larkspur." The hulk was to be caulked by the Plaintiffs: it was to be taken from the harbour by the Defendants at their own risk and was to be returned in the same condition as when delivered. In case of failure to return the hulk the Defendants agreed to pay Rs 6,000 as its value.*

*It was also agreed that the Defendants would pay Rs 50 a day for every day they kept the hulk beyond 15 days.*

*The Defendants took the hulk on the 15th October 1883 and kept it until the 6th December 1883 when in a gale it broke from its moorings, and was wrecked and lost on the reefs of Black River.*

*The Plaintiffs claimed:*

*Rs. 6,000 as the stipulated value of the hulk.*

*Rs. 3,350 for non delivery of the hulk from 2nd November until 8th January, date when the declaration was entered.*

*Rs. 3,682 for certain extra caulking and for the value of certain plant, tools and materials gratuitously lent to the Defendants by the Plaintiffs to aid them in raising the "Larkspur."*

*The Court considered that the Defendants had not used proper care and attention for the preservation of the hulk, and ordered that the Plaintiff do recover from the Defendants Rs 6,000 for the value thereof.*

*In the second point, it was shewn that on the day the plea was filed Defendants had paid into the Registry of the Supreme Court the sum of Rs 1,750 being the amount due for the hire of the hulk from the 2nd November to the 6th December. The Court held that this payment was valid and that the remainder of the sum (Rs 1,600) for the hire of the hulk at Rs. 50 per day from the 6th December to the date of the action, was not due.*

*On the third point the Court gave judgment in favor of the Plaintiffs for the value of the plant, tools and materials lent which had not been returned as received.*

*The Court considered that these three actions should have been joined together, and found that the Plaintiffs were only entitled to half their costs up to date of proof and two thirds of the costs afterwards.*

—  
DRY DOCKS COMPANY—Plaintiff

versus

SOOBANA AND ANOTHER—Defendants

—  
Before

His Honor ANDREW MURK, Puisne Judge

and

His Honor JOHN ROUILLARD,  
Acting Puisne Judge

P. L. CHASTELLIER—Counsel for Plaintiffs.  
A. J. COLIN—Attorney for the same.

W. NEWTON—Counsel for Soobanah, one of the Defendants.  
H. BERTIN—Attorney for the same.

H. HEWETSON—Counsel for Soopraya, the other Defendant.  
W. HEWETSON—Attorney for the same.

Record Numbers { 22,270  
22,271  
22,272

—  
21st August 1884.

By an act under private signature dated 12th October 1883, the defendants hired from the plaintiffs the hulk "Mars" for the purpose of using it in raising the ship "Larskpur" which, sometime before, had sunk near the entrance of the harbour, and had been bought at a public auction by the Defendants. By the terms of the agreement, the hulk was hired, in the condition in which it then stood with the exception of some caulking (*quelques travaux de calfatage*) which the plaintiffs undertook to cause to be made, for a period not exceeding fifteen days and for a sum of Rs. 1,000 paid cash, the defendants binding themselves to take the hulk at their own risk and peril from the place when it was moored in the harbour of Port Louis, and to return it in the same condition as it was at the time of delivery. In case of failure on the part of the Defendants to return the hulk, they agreed to pay Rs 6,000 as its value.

It was further stipulated that in case the ship was kept by the Defendants beyond the period of fifteen days, the defendants would pay to the plaintiffs a sum of fifty Rupees per day. The defendants took delivery of the hulk on the 15th October and kept and used it until the 6th December following, when, in a gale, it parted from its moorings near the sunken ship and was wrecked and lost on the reefs at Black River. Three actions were then brought by the plaintiffs against the defendants. In the first action, the plaintiffs claimed the sum of Rs 6,000 as the stipulated value of the hulk. In the second action, the plaintiffs sought payment of Rs 3,350 for non-delivery of the hulk from the 2nd November until the 8th January 1884, at which date the declaration was entered; and lastly the



plaintiffs claimed Rs 3682, being the value of certain extra caulking and other work done to the hulk "Mars" (this particular item amounting to Rs 650) and of certain plant, tools and materials gratuitously lent by the plaintiffs to the defendants with the view of aiding them in the lifting up of the "Larkspur." To each of these actions, distinct defences were set up, and for the sake of convenience, each claim will be separately considered by the Court. In the first action, the plaintiffs' claim rested on two grounds: 1o. It was contended in the first place that, the hulk "Mars" having been hired by the defendants under the conditions above set forth they were bound under the ordinary law relative to hire, to use proper care and caution for the preservation of the object leased, but that the defendants have failed in doing so 2o. It was urged in the second place, that, even if the Court came to the conclusion that the defendants have not failed in that part of the contract, they were still liable for the loss of the hulk in as much as in terms of the agreement they had hired it at their own risk and peril, which clause must be held to cover cases of *vis major* such as the occurrence of the gale which took place on the 6th December, and which was the cause of the loss of the hulk. The defendants denied that they had not used proper care and caution, and as to the second ground of liability, it was contended that the clause by which the defendants agreed to take the hulk "Mars" at their own risk and peril, can be understood as covering only the cases of *force majeure* which could be foreseen at the time of the making of the agreement, and that such a thing as a cyclone passing on the 6th December in any year, sufficiently near the Island to cause a gale, could not have been contemplated by any of the contracting parties at the time of concluding the agreement. On the law which governs the contract of hire, there cannot be any doubt, unless there be an express agreement to the contrary, the person who takes an object on hire is bound to use proper care and attention, or if we use the characteristic expression of the Civil Code the care and attention of a *bon père de famille*. The first question therefore arises. Have the defendants shown that amount of care and attention in dealing with the hulk which they had taken on hire?

After carefully weighing the evidence produced by both parties, we have come to the conclusion that the defendants have not used that proper care and attention. We think that they have failed in two points: First, the

hulk ought to have been secured by two good anchors; with that precaution, in the opinion of the Harbour Master who appeared as witness for the Defendants, a ship ought to ride out any ordinary gale. Even if the bad weather which was experienced on the 6th December 1883 is held as amounting to a gale, the evidence shows that it was not a gale of unusual violence. The great probability therefore is that the hulk "Mars" if properly secured, would have kept her ground, in the same way as the ship "Alert" did, which was moored a short distance from it. In the second place the only anchor used astern was of small dimensions and the chain, of which a specimen was produced in Court, was not sufficiently strong to hold a ship in bad weather. That the hulk was sufficiently secure for good weather, is indeed no defence, for, in the first place, a ship lying outside the harbour, ought always to be prepared for bad weather, and then Doctor Meldrum has told us, that although cyclones were of rare occurrence in December, yet they were known to have occurred at that time of the year and the hurricane season, according to him, begins from the 1st December and lasts until the 15th April following. Another cause of insecurity was the tying of the hulk "Mars," to the "Larkspur" itself a moveable object, which was carried away during the gale. At the approach of bad weather proper steps ought to have been taken to disconnect the two ships. As we find, for the reasons above set forth, that the Defendants were at fault, it becomes unnecessary to consider the other points urged by the plaintiffs to establish the liability of defendants for the loss of the "Mars" and as the sum to be paid for the hulk, in case of its not being returned was Rs 6000, the plaintiffs must recover from the defendants for that amount. The second action in which a sum of Rs 3350 is claimed from the Defendants, at the rate of Rs 50 per day, for having kept the hulk "Mars" beyond the time stipulated, payment in Court is made of the sum of Rs 1750 representing the sum due for not returning the hulk "Mars" from the second November until the 6th December when she was lost in a gale. Objection was raised to this payment into Court as being irregularly made, and according to plaintiffs' contention, a real tender of a sum of money ought to have been made to them, or a regular notice given that the sum was deposited at the Registry of the Supreme Court. We do not think however that the objection ought to be upheld. The days of technicalities are fortunately over, and when the defendant states in his pleadings that he owes a certain sum of money and that he brings it into Court

the only possible construction is that the money has been paid into the hands of the officer of the Court having authority to receive such payments, and as a matter of fact we are informed that the sum was paid into the Registry on the very day when the plea was filed. As to the remaining Rs 1600 which are meant to represent the indemnity payable to the plaintiffs for failure to deliver back the hulk "Mars" from the 6th December 1883, when the ship was wrecked, to the date of the action brought, we do not consider that sum due. If the hulk "Mars" was not returned, it is because it was utterly lost, and, for the case of loss there was a special provision introduced into the agreement between the parties. In that contingency the value of the hulk was fixed at Rs 6000. The present claim would, if the plaintiffs' theory was upheld, represent damages, payable in addition to the sum due, according to agreement, in case of loss, a thing which as the agreement provides for the payment of Rs 50 per day of additional rent was surely never contemplated by the parties. On the points raised with reference to this second action, our judgment will therefore go for the defendants. We now come to the third action, to part of the plaintiffs' claim our judgment must clearly be in their favour. There cannot be any doubt in our mind that, subsequently to the agreement entered into between the parties, on the twelfth October 1883, the Defendants, at the request of Plaintiffs, allowed many articles to be put on board of the hulk "Mars" which did not originally belong to that ship, the object of the plaintiffs being simply to help the defendants in their under-taking to raise the sunken ship "Larkspur." These articles were lost at the same time as the hulk itself, and, for the same reasons which we gave where we decided that the Defendants were responsible for the loss of the hulk, they must be held to be responsible towards the Plaintiffs for the value of the articles which they have not returned. We further consider that the value set upon these articles in the plaintiff's declaration, is fair and reasonable. An attempt was made to show that the plaintiffs are at fault for not taking back those articles after the wreck, but this point is untenable. Surely, the plaintiffs were not bound to go to Black River to resume possession of the articles which might have been saved from the hulk, and there is no evidence that any of the articles saved were offered back to the plaintiffs in good condition and refused by them. The question whether there has been extra work done to the amount of Rs 650, for which the plaintiffs make an additional claim against

the Defendants, is one which turns entirely on the credibility of the witnesses produced. There is indeed great force in the argument of the Defendants that, the parties having agreed to put into writing the condition relative to the hire of the "Mars" must be presumed to have included in the document signed by both of them, all that each of them bound himself to do and perform. That presumption is indeed so strong, that in civil matters evidence is not even receivable to prove conventions made to vary a written contract or to add to it; but the rule is otherwise in commercial matters, and after listening with attention to the evidence of Lassime, corroborated, as it is, by that of Vielle and of Lesur, we have become convinced that things took place as related by the plaintiffs, namely, that after the terms of the original agreement were struck, and whilst the conventions were being put into writing, which occasioned a delay of three or four days, the Defendants found that, in order that the hulk should be fitted up for the object which they had in view, they required additional works to be performed, for which a sum of Rs 450, to be paid by Defendants, was agreed upon, and that subsequently, some other works, to the value of Rs 200, were ordered by Defendants to be performed.

In this third action therefore our judgment will be in favour of the plaintiffs. The last point left for our consideration is that of costs. It has been submitted by the Defendants that instead of three actions, there ought to have been but one raised against Defendants, and objection is taken to the unnecessary increase of costs, resulting from this division of actions. On turning to article 42 of the Rules of Court we find that different causes of action of *whatever kind* may be joined in the same suit; provided they be by and against the same parties and in the same rights. If actions which have different origin may be joined together, it is difficult to see why these three claims, arising out of the same transaction, and which are raised by the same plaintiff against the said Defendants, should not have been included in the same action, and the best demonstration that these three claims ought to have been made in one and in the same suit, is the fact that, although there were three actions, they were practically taken together. Only one argument was heard for all three, and our judgment disposes of them all. This matter has its importance with reference to the costs with which the defendants should not be unduly burdened. We think the justice of the case will be met by fin-

ding the Plaintiffs entitled to one half of their costs up to the date of the proof, and then to two thirds of their costs from the date of the proof onwards. We also order that the Plaintiffs do uplift the fund consigned with the Registr under the second action.

### SUPREME COURT.

#### CLAIM OF MONEY UNDER A PARTNERSHIP.

*The Plaintiff in this matter claims a sum of Rs 14,310.67 under a deed of partnership which had been entered into between himself and two of his brothers, one of whom subsequently died.*

*By the deed of partnership the share of the Plaintiff and Defendant was 7/17 and that the deceased 8/17.*

*The partnership came to an end on the 30th November 1877, the Supreme Court ordered the licitation of the Stock in trade, Books, accounts &c. and on the 31st October 1878 the whole was sold before the master to the Defendant for 20,000.*

*Plaintiff alleges that between the 30th November 1877 and 25th October 1878 the Defendant received for sales and from sundry debtors, the sum of Rs 34,754.24 which has not been divided amongst the partners, and that 7/17 of that sum is due to him.*

- The defendant denied the facts in manner and form as set forth in the declaration, and pleaded that he was not indebted to the plaintiff, he averred that the deed of partition of all monies of the firm had been made by Mr Notary Barry, had been duly approved by all parties and homologated by the Supreme Court, and that the rights of the parties had been finally settled thereby, by consent of all parties and with their full knowledge.*

*The Court after examination of the "cahier des charges" with annexed Inventories and "Etat de Situation" gave judgment in favor of Defendant with costs.*

**HERMANS—Plaintiff**

*versus*

**HERMANS,—Defendant.**

—  
Before

His Honor A. MURE,—Puisne Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge

V. KIVERN,—Counsel for plaintiff  
A. ROHAN,—Attorney for the same

P. L. CHASTELIER,—Counsel for defendant  
A. J. COLIN,—Attorney for the same.

Record No. 22359.

21st August 1884.

In this action the plaintiff one Joseph Hermans brings a claim of Rs 14,310.67 c. against his brother Hermippus Hermans. It appears that a co-partnership existed between the plaintiff, defendant and another brother, now deceased, for the purpose of carrying on an ironmongery business under the style of "Hermans frères." In this co-partnership the plaintiff's share was of seven-seventeenths, that of the deceased brother three seventeenths, and that of the defendant seven seventeenths, the loss and profit being shared in these proportions. The partnership expired on 30th November 1877, and on the 29th December following, by a rule of the Supreme Court of that date, a sale by Licitation of the stock in trade together with all the books, papers and accounts generally was ordered to take place before the Master of the Court; at the same time it was ordered by the Court that an inventory of the whole stock in trade and sundry debtors accounts should be made by the plaintiff and defendant and by Mr. Félix de Froberville, exchange broker, this latter representing the minor children of the deceased partner. It is further alleged that the said inventory was drawn up, and that by the first article of the said *Cahier*, it is made a condition of the sale that the purchaser shall not be entitled to claim such articles mention-

in the inventory as may have been sold at the date of the final sale or such accounts as may have been cashed at the date of the sale. The plaintiff proceeds to allege that it is mentioned and shown by the last inventory or general recapitulation of the position of the said co-partnership, signed by the defendants and dated the 25th October 1878, which is annexed to the said *Cahier des Charges* that between the last inventory or recapitulation and the first one, began on the 30th November 1877, the defendant received in cash for the daily sales the sum of ..... Rs 15,263.82 and from the sundry debtors the sum of ..... 19,490.42

Rs 34,754.24

and that seven seventeenths of that sum is still due to the plaintiff, the said principal sum of Rs 34,754.24 c. never having been divided among the partners of Hermans frères, and being still in the defendant's hands.

The plaintiff further alleges that by a judgment of adjudication on the 31st October 1878, the defendant became the purchaser of the stock in trade and sundry debtors, for the price of Rs 20,000, which price was partitioned and divided by Mr Notary Barry. The plaintiff then claims payment to him of the special sum above mentioned.

To this action the defendant has pleaded, denying all the facts in manner and form as set forth in the declaration, that he is not indebted to the plaintiff, and he avers that the deed of partition of all moneys belonging to the late firm had been made by Mr Notary Barry, had been duly approved by all parties and homologated by the Supreme Court, and that the rights of parties had been finally settled thereby, by consent of all parties and with their full knowledge; that the sums divided formed the whole assets of the said firm, and further that the plaintiff had seen and knew the *Etats de situation* as at the 25th day of October 1878, the defendant's pleas amount on the merits to a denial that anything is due to the plaintiff by the defendant, and to the estoppel of the plaintiff's claim. At the discussion of the cause the defendant was called on his personal answers, in the course of which he admitted that he had received monies between the date of the first inventory, and the day of sale, and explained that the store had continued its operations between these days, and that his brother the plaintiff was then a clerk in the shop, and was present when the *Etat de situation* was drawn up, that some changes took place between the

day of the inventory and the day of sale, both as to debtors and to goods in the shop, and he alleges that the monies he received were applied by him in payment of outstanding accounts and general expenses.

The *Cahier des Charges*, to which the relative inventory and *Etat de situation* are annexed, and also the deed of partition with the minutes of approbation of the parties thereon, have been produced, and the Court has carefully considered these documents. From the first clause of the condition of sale above quoted of the said *Cahier*, it is apparent that the business of the firm was being carried on, and the usual transactions of sale were being made, and accounts incurred both by and to the firm, between the expiry of the partnership and the date of the sale by the Master. It is also a part of this clause that four days previous to the final sale of the stock in trade and outstanding accounts, there should be filed as part of the process of Licitation, a note of the goods sold, of the accounts cashed, and also of all new outstanding accounts. Turning to the relative inventories and *Etats de situation* annexed to the *Cahier*, it appears that between the 30th November 1877 and 25th October 1878, sales were made for ready money to the amount of ..... Rs 15,263 82 and on credit ..... 23,940 80

Rs 39,214 62

The next entry is a note of goods taken into the shops between the same dates amounting to ..... 14,621 66

Then comes a note of the accounts which were contained in the inventory of various debtors of the 30th November 1877, vizt ..... 13,826 08

To which is then added the above total sales on credit from 30th November 1877 to 25th October 1878 amounting to ..... 23,940 80

Rs 37,766 88

But deduct therefrom the amount of the accounts paid between the said dates .... 19,490 42

Leaving due .... Rs 18,276 46

Another entry occurs of promissory notes and *Bons* apparently in existence at the date to which reference need not be more specially made. But on the other hand there is a note of sums to be paid by the Company.

Bills in circulation .....	Rs 7,427 62
Due to various persons for goods .....	6,935 86
Due to Faure frères of Bordeaux.....	3,251 02
	<hr/> Rs 17,614 50 <hr/>

These *Etats de situation* are all signed by the plaintiff and defendant, and by Mr. Félix de Froberville acting as above mentioned.

It is true that no general balance is brought out by these *Etats de situation*, and it is notable that no allowance is made for current expenses incurred by the partners for their livelihood and for the general expenses incurred in conducting the business in the shape of wages, etc. But at the same time everything was done in the presence of the plaintiff, and he signs each one of these *Etats de situation*. When the day of sale arrived on the 31st October 1878, and the offer of Rs 20,000 was made by the defendant for the stock and outstanding accounts then sold, the Attorney for the guardian of the minor children objected to the sale on account of the low figure offered, but Mr Esnouf, the Master of the Court, considering the fact that, over and above the said sum of Rs 20,000 the purchaser had to pay all the promissory notes, bills of exchange and other debts of the firm Hermans frères, considered the price offered fair and reasonable, and there being no out-bidders he made the adjudication to defendant. From this memorandum it would appear that the same objection as the plaintiff now takes, was then taken by a representative of an interested party and was disposed of by the Master; of course the fact that another person has taken objection does not in law prevent the plaintiff from taking the same objection now, but at the same time he either was or ought then to have been present, and his attention must have been called at the time to the fact that objection had been taken, and that the Master, holding the defendant responsible for all the obligations of the firm, considered the price offered by him fair and reasonable, which undoubtedly implied that the price offered was the only sum

to be divided between the parties entitled. This procedure was followed some time subsequently by a deed of partition, in which the Notary, in his preliminary observations, narrated the deed of partnership, the making of the inventory, and under the third observation are narrated all the *Etats de situation* which appear in the *Cahier des Charges*, and the stipulations of the *Cahier des Charges* themselves. There follows the narrative of the adjudication to the defendant for the price of Rs 20,000 and the Notary then proceeds "Cette somme est la seule qu'il y ait à partager entre les ayant-droits, M. Hermans par suite de l'adjudication ci-dessus relatée, ayant pris charge du passif de la société et devant profiter de l'actif tel que le tout est établie aux différents *Etats* énumérés ci-dessus."

This is a very important clause in reference to the question which is now before the Court. From it the plaintiff was bound to deduce, (first) that the sum of Rs 20,000 was the sole amount divisible among the parties interested, (second) that the defendant was burdened with payment of all the debts of the partnership, and (third) that being so he was entitled to profit by and take advantage of the assets as all had been fixed by the different *Etats* or balance sheet; there can be no doubt whatever that these three propositions are contained in this clause of the deed of Partition. They certainly indicate the views of the parties as communicated to the Notary. The plaintiff himself was a party to each and every one of these, and there is as little doubt that at the time, he entertained the view that the sole sum to which he had a right to claim a share was that of the Rs 20,000 above mentioned. For turning to the minutes of approbation, the date of which is 4th February 1870, which is a part of the deed of partition, the plaintiff appears before the Notary and acknowledges that he and all the others have had separately cognizance (*communication*) of the deed of Partition, and that it has been read to them altogether entirely, and the minutes proceed to say that, after having examined the Deed in all its clauses and verified and compared the calculation which it contains, they declared that they approved the different calculations, such as they had been fixed, and agreed on the result thereof in reference to the sum fixed for each of the parties entitled, that they approve and accept the various "abandonnements" and the values which composed them. They direct the Deed of Partition to be submitted to the Supreme Court for homologation and each of

them, and amongst the rest the plaintiff, signs this minute of approbation. The Deed of Partition was subsequently homologated by the Supreme Court, and the plaintiff has received the amount which accrued to him under that Deed. The receipt is dated 26th September 1888.

It will be observed that the claim made by the plaintiff is for his share of two specific sums, which comprises everything which came into the possession of the defendant during the eleven months which elapsed between the day of the expiry of the partnership and that of the sale, and he makes no allowance for expenses, salaries, bills and accounts paid, nor even for those items, which he has admitted under his hands, in the various *Etats de situation*. It is clear that a decree could not be pronounced in his favor for the sum which he now claims. But again the plaintiff who does not plead fraud, or violence, or minority has not even set up specially error in law or fact, well knowing that the framers of the Code included error as one of the grounds of challenging a deed of Partition, but that that ground of challenge was excluded by the Counsel of state. Yet it is on account of an alleged error in fact that the present action has been brought and it is a conclusive answer thereto that by an authentic deed under the plaintiff's hand, he has admitted that there was no error and that the defendant who became liable to pay all the obligations of the firm was entitled to take advantage of whatever assets remain over after paying these obligations. He, even after more than three years reflection, signs the receipt for the sum to which he is entitled under the deed of partition. It thus appears that by his conduct in signing the deed he has put an end to all other claims. "No man" says Lord Mansfield "shall be allowed to dispute his own solemn deed, and even facts recited in a deed are conclusive on the party executing it. The principal seems to be a sound one that a man who solemnly enters into an engagement by the most solemn instrument which the law knows, shall not thereafter be permitted to deny a fact which he has there admitted."

But further, on the merits of this case, it is clear that firstly the *Cahier des Charges* and secondly the deed of Partition deal with and dispose of the very two sums a share of which the plaintiff now claims. The said two sums are merely elements for the notary's calculation, and there is a clear admission by the plaintiff that the defendant is entitled to ap-

propriate these sums in payment of the obligations and debts due by the firm. On these grounds we hold that the defendant is entitled to succeed in his plea and we dismiss this action with costs.

## SUPREME COURT

CHEQUE NOT PAID ON PRESENTATION—SHOULD BE PRESENTED FOR PAYMENT WITHIN A REASONABLE TIME—WHAT IS A REASONABLE TIME?

*In this matter the Defendants gave the Plaintiffs on the 12th May 1884 a cheque for Rs. 28,344.59c., upon the Oriental Bank in payment of some outstanding drafts.*

*The cheque was not presented for payment on the 13th May, and on the 14th the Oriental Bank suspended payment.*

*The holders of the Cheque sue the drawers for the original debt.*

*The Court held that the Plaintiffs had not allowed an unreasonable delay to elapse before presenting the Cheque for payment, and gave judgment in their favor.*

SCOTT & COMPANY,—Plaintiffs

versus

JONUS ALLARAKIA,—Defendants

Before

His Honor A. MURE,—Puisne Judge

and

His Honor F. C. WILLIAMS,—Puisne Judge

G. GUIBERT,—Counsel for Plaintiffs

E. GANACHAUD,—Attorney for the same

L. ROUILLARD,—Counsel for Defendant  
F. ROBERT,—Attorney for the same

Record No. 22,478

JUDGMENT OF HIS HONOR F.C. WILLIAMS

21st August 1884

On the twelfth of May last, whether with-  
in or without banking hours we have no  
certain knowledge, the Defendant in this case  
gave the Plaintiffs a cheque for 23,344.50c.,  
upon the Oriental Bank in payment of some  
outstanding drafts. Owing to certain special  
circumstances, as the Plaintiffs alleged, this  
cheque was not presented for payment on the  
thirteenth May; and on the fourteenth the  
Bank suspended payment. The holders of the  
cheque now sue the drawers for the original  
debt, on the ground that the cheque did not  
operate as payment and the drawers resist the  
claim upon the ground that they are exonerated  
because the holders did not fulfil an im-  
plied obligation to present the cheque for pay-  
ment within reasonable time.

If this question of responsibility for the  
consequences of non-presentment arose under  
the law of the mother country, we should have  
certain fixed landmarks to guide us in arriving  
at a decision. The English Law upon the  
point is unwritten law, but it is to some extent  
established by English precedents and is cer-  
tainly the law of England as expounded in  
English text-books,—that the holder of a  
cheque payable in the place where it is ten-  
dered is under an obligation to present it for  
payment, not certainly upon the very day of  
its tender, but at least within the business  
hours of the day following, failing which he  
takes upon himself any loss which may arise  
in consequence of non presentment. The pre-  
sent law of France upon this same point is the  
written law of 1865, and, in accordance with  
its terms, the holder of a cheque has five days  
within which to present it for payment with-  
out risk in any case to himself. Thus, accord-  
ing to the present law of England, which is  
unwritten, the Defendant might be reasonably  
held entitled to our verdict in this case, while,  
according to the present written law of France,  
the Plaintiffs would most certainly be entitled  
to that verdict.

However, neither the law of England, nor  
the written law of France, since the promul-  
gation of the Napoleonic Codes, have any *in*  
*facto* force in this Colony. If we are to decide  
the question before us upon a basis of law, it  
must be such law as we can gather from the  
Codes, and the "Code de Commerce" is  
silent upon the express subject of cheques,  
which were, in fact, virtually unknown when  
it was promulgated.

There is another basis, and a more satis-  
factory one, upon which our verdict might  
have rested, and upon which the unwritten  
law of England rests now. I mean the basis  
of "law merchant" or commercial custom.  
But that has not been appealed to in the ar-  
gument. Lord Ellenborough in *Hickford v.*  
*Ridge*, the earliest leading case upon the sub-  
ject under notice in England, founded his  
opinion upon the "law merchant" of the  
locality, as to which evidence had been ten-  
dered in the case. We are, strange to say,  
without any such assistance here. We have  
deal with the question as arising in a com-  
mercial community where there is no custom  
which has received the seal and the sanction  
of usage with respect to the presentment of  
cheques for payment.

In the absence of evidence of custom, fall-  
ing back upon the law of the Codes, the  
learned Counsel for the Plaintiffs asked us to  
place ourselves in the position of the French  
Court of Cassation prior to the passing of the  
Cheque Law of 1865. If the "Code de  
Commerce" is silent as to the presentment  
of cheques, it is not silent as to the present-  
ment of "*lettres de changes*", and we were  
urged to accept the analogy of the English  
view, and regarding the cheque as a species  
of "*lettre de change*", to consider the holder  
entitled to six months for its presentment  
under article 160 of the "Code de Com-  
merce." Authorities were quoted for and  
against this view of the essential nature and  
status of a cheque in France prior to the law  
of 1865; but it is surely not going too far to  
hold that the framers of the aforesaid article  
160 never had the case of a cheque in con-  
templation, and that, as Sirey reports in the  
passage quoted from the "*Exposé des motifs*",  
in 1865, it was never intended to accord to  
the holder of a cheque a delay for present-  
ment so long as is accorded to the holder of a  
"*lettre de change*" by article 160.

The best argument for our following the  
analogy of the French Law of 1865 in the  
matter before us, is no doubt that this law

was probably framed in contemplation of article 160 of the Code which is in force here. That argument, however, is not conclusive enough to guide me to a decision. In the absence of settled law, rather than place ourselves in the position of the French Court of Cassation prior to 1865, when cheques in France were comparatively unknown documents, I think we had better place ourselves in the position of the Courts in England when cheques were in common use, as they are in Mauritius now, but when the law upon the subject of their usage was unsettled, as, unfortunately, it is in this Colony to day. Lord Ellenborough, as we have seen, was guided by "law merchant" and commercial usage, of which we have no evidence here; but this case went no further than to hold that presentation of a cheque on the day of its receipt was not absolutely necessary. Between the date of that early case and 1869, one would have supposed that custom would have become pretty well established in the trading community upon all points connected with payments by cheque; yet as late as 1869 we find Baron Bramwell in the case of *Hopkins v. Ware* expressing himself in terms of very considerable doubt as to the limit of reasonable delay which the holder of a cheque can claim before presenting it for payment. He said: "It might be that one week would be a reasonable period to allow, or perhaps two weeks, but it is unreasonable that three weeks should be allowed to pass without presentment."

The learned Baron was here surely speaking upon the *principle* on which cheques are employed in commerce, and not upon *custom or law*. We, in the absence of proved law or custom, are entitled to do the same in the case before us. We may find the same difficulty as presented itself to Baron Bramwell in *Hopkins v. Ware* as to deciding what is a reasonable delay before presentment. But we are not called upon to fix the terms of that delay. If that is to be done, the Legislature of the Colony should do it, as it was done in France in 1865. Still, taking the case before us, we may at least enquire and decide what delay is *unreasonable*. Baron Bramwell, adopting this as the more convenient method, pronounced as *unreasonable* a delay of *three weeks*; are we to say the same of a delay of one working day? The holder of a cheque is, after all, only the bearer of a mandate from a principal to his agent for the payment of a sum of money whereof the agent is the depository. This condition of affairs carries with it, in its very nature, apart from law or

custom, an obligation on the holder's part to present that mandate to the Agent without undue delay such as may involve confusion. If he delays to an extent which implies that he considers himself, not the holder merely, but the absolute owner of the cheque for negotiable purposes, or as an actual equivalent for cash, he takes upon himself all the liabilities connected with the mandate, and the drawer is by consequence, exempted from those liabilities and responsibilities. This is the view which may reasonably be taken of a cheque from the very nature of the document itself, and I think it is strongly supported by the remarks of the Judges in *Hopkins v. Ware*: "This cheque when given," said Baron Channell in the same case, "did not operate as payment. It only did so upon the duty to present it within reasonable time being neglected."

In the case before us now, I do not think, upon a careful view of the facts, that we can find that the Plaintiffs, who were the holders of the Defendant's cheque, dealt with that document in any mode, either by undue delay or otherwise, inconsistent with their position as parties through whose hands it was merely to pass, in due course, from principal to agent, and that thus they assumed any direct responsibilities in connection with it which exonerated the drawer from his own responsibility for its value as representing the actual money for which it was drawn. Here, as in the case of *Hopkins v. Ware*, the Defendant's cheque would only have operated as payment in case it had been withheld from presentment for an unreasonable time. Upon no basis of law, or of proved custom, any more than of fact, is it apparent to me that such an unreasonable time was suffered to elapse by the Plaintiffs; and that the Defendant cannot by consequence be exonerated from his liability to find value for his cheque, but must pay the penalty of selecting an insolvent agency as the depository of the money which was to meet his obligations. I therefore concur with my learned brother in finding for the the Plaintiffs.

#### JUDGMENT OF HIS HONOR A. MURR

21st August 1888.

In this case the plaintiffs sue the defendants for payment of Rs 23,844.59 c., the amount of three Bills of Exchange, drawn by a Calcutta merchant on the defendants in Mauritius, which were endorsed by the



drawer to the Chartered Bank of India, Australia and China, and held by the plaintiffs at the date now to be mentioned against goods shipped from Calcutta to Mauritius.

On Monday the 12th May last the defendants sent their clerk, one Ramchetty, with their cheque for the above sum, drawn on the Oriental Bank Corporation, and handing it to plaintiffs' cashier, obtained delivery of the three drafts, acquitted in their favor, with the relative bills of lading, invoices and policies of insurance. The plaintiffs allege that this took place after 3 o'clock on that day, at which hour it was admitted all the Banks in the city of Port Louis cease to do business for the day, and it was also admitted that on the following day, the Mail Steamer for Australia arrived in the morning and left in the afternoon. The plaintiffs further allege and prove that their collecting clerk was not at the office on that day, being reported as unwell, and that in consequence of his absence, and the excessive amount of business to be transacted on a monthly Mail day, the cheque was not presented for payment that day; on the following morning the 14th May, when the plaintiffs presented the aforesaid cheque for payment into their account with the Commercial Bank, they were informed that the Oriental Bank Corporation had that morning stopped payment. The usual protests and legal demands (*mise en demeure*) having been made both against the Bank and the defendant, and the latter having repudiated liability, the present action was raised. The defendants have pleaded as a matter of fact that the cheque was given to the plaintiffs between 12 & 1 o'clock of the day of the above Monday, and that the defendant had money in the Bank, and the cheque would have been paid if presented either that day or the next, and as a matter of law that the plaintiffs were guilty of gross negligence in abstaining from getting the cheque cashed on the Monday the 12th and also on the Tuesday 13th May. The plea of negligence is twice repeated with reference to each day and it is worthy of notice that it does not set forth any written law or custom of merchants the breach of which constituted the negligence. In such a case negligence must result either from the breach of some positive law, or of some mercantile custom, and the Court is left in ignorance to which of these the alleged negligence refers.

There is a grave conflict of evidence between the plaintiffs' and defendant's witnesses upon the question of the hour of the day that the cheque was handed to the former. Three

witnesses, Clerks of the Plaintiffs, speak quite certainly to the cheque being given after 3 o'clock on the Monday, while Ramchetty swears to his being in the plaintiff's office and handing the cheque to the Cashier about 11 o'clock, and he is confirmed by four witnesses who speak to facts, which are consistent only with the cheque being given at an early hour of the day. It is strange that the defendants in their plea give another hour, which is not consistent with their own evidence. But without expressing any opinion on this question of fact, I shall assume for the purpose of this judgment that the plaintiffs had possession of the cheque on Monday in time to have presented it to the Bank on that day. I shall also assume that the defendants had money in the Bank to meet the payment of the cheque, though in point of fact their managing partner had arranged that very morning to overdraw their account, and the sum in Bank, after providing for another cheque, granted on the same day, fell short by some Rs 2000 of the amount in the cheque. The question to be decided is this—it being undoubted law that the granting of a cheque is not a novation of the debt nor payment of it unless it be subsequently honoured, does the delay of cashing the cheque, in the circumstances, destroy the recourse of the creditor upon his debtor, and throw the partial or total loss which must necessarily arise from the failure of the Bank on the former? No doubt books of English Law lay it down that if a cheque is received one day, it must be sent out for collection the next, and if lost is sustained by delay in presenting it, the party is to suffer, whose negligence has caused the loss.

The learned Counsel for the defendants argued that the system of paying by cheques had been borrowed by the merchants of Mauritius from England, and that they must be held to have taken the system in its entirety from the mother country. On the other hand it was contended that the Court was sitting as a French Court of Law and bound to administer the law as a French Court would do before 1865, in which year a special law on cheques was passed through the French Legislature. I shall first consider the principal on which the English cases seem to turn, and then glance at the French Law, and try to determine the principle by which we should be guided in this case. I shall take the earliest and the latest of the cases in our English Books, which seem to be leading cases on the question under discussion. In *Rickford versus Ridge & Cambell's Reports* page 537 the rubric is in these words: "A Banker in London who receives a cheque by the general post, is not bound to present

it for payment till the following day" It is not worthy that the rule is not stated by the learned reporter positively but negatively. In that case the cheque dated the 11th of the month was handed to Country Bankers on the 3th who did not forward it to London, by a post which left at 6 o'clock the same evening, but on the morning of the 14th. The London Bankers did not present the cheque till the following day the 15th when the answer was no effects must see the drawers." These paid at their own counter till 4 o'clock on the 15th but no application to pay this cheque was made to them. Notice of its dishonour was given to the defendant on the 16th. Thus this cheque was in existence for five days before the stoppage of the drawers, and would have been paid on any one of these days, if it had been presented to them. The Custom of Bankers, west of St Pauls, was proved that cheques and bills for payment were sent out only once a day, and as this was generally before letters were delivered, cheques and bills contained in such letters remained with them till the following morning, while it was admitted that Bankers East of St Pauls, present for payment all Bills and cheques the very same day they receive them by the post. These being the facts Lord Ellenbrough remarked that the question must be decided by the law-merchant.

"It is always to be considered, whether under the circumstances of the case the cheque has been presented with reasonable diligence. This is what the Law-Merchants requires. The rule that the moment a cheque is received by the Post, it should invariably be sent out for payment, would be most inconvenient and unreasonable. The rule to be adopted is a rule of convenience, and it seems to me to be convenient and reasonable that cheques received in the course of one day should be presented the next. Is this practice consistent with the law-Merchant? It cannot alter it. Bankers would be kept in a continual fever, if they were obliged to send out a cheque the moment it is paid in. The arrangement mentioned by the plaintiffs' witnesses appears subservient to general convenience, and not contrary to the Law-Merchant, which merely requires cheques to be presented with reasonable diligence."

The action was to recover back a sum of money paid by the Country Bankers to the original payee of the cheque, and the jury under the above direction found a verdict for the plaintiffs. That is to say, they held that

Bankers who had a cheque for three days in their possession during which it might have been paid had not lost their recourse against the holder of the cheque for the money they had advanced to him. The position of the defendant was there much more favorable than that of a person ultimately liable for payment of the debt, again it will be observed that Lord Ellenbrough founds his opinion upon the custom of Bankers in London, which was proved to the jury, and that the whole doctrine which can be derived from the case is, that a cheque must be presented with reasonable diligence. The last decided case is that of *Hopkins v. Ware* L.R. 4 Exchequer cases, Page 263, in which the facts were, that on the 9th May the defendant solicitor, forwarded his own cheque to the plaintiff in payment of the amount due on a promissory note; he kept the cheque till the 6th June, when it was forwarded through a London Banker for presentation. On the 9th June it was presented and dishonoured. Now on this state of the facts Baron Bramwell thus puts the law to be applied to the case. "Then was there an unreasonable delay? It is often difficult to describe to a jury what is such a delay, when there is no obligation to present at any precise time, as on the next day or the day after; but though it is difficult to draw a dividing line, it is not difficult to say in particular circumstances, that a case is one side of the line, or the other. It might be that one week would be a reasonable period to allow, or perhaps two weeks, but it is unreasonable that three weeks should be allowed without presentment. Therefore without saying what would be a reasonable time, an unnecessary and unreasonable time was in fact allowed to elapse before the cheque was presented etc." In that case it was held that the debtor was discharged. From both these cases it may be deduced: that there is no absolute rule of Law in England, that a cheque must be presented for payment the next day after its date, so that recourse must be preserved against the true debtor, and that the question is always one of reasonable diligence or unreasonable delay. Were the plaintiffs Messrs Scott & Co., who are merchants in Port Louis, guilty of unreasonable delay in not presenting the cheque the same or at least the next day for payment? It is to be kept in view that there was no averment in record, or tender of evidence in regard to mercantile usage, and that we are living in a Colony governed by French Law, and in the present instance the rules of the *Code de Commerce*, if there be any, must be considered the regulating principles, under which the plain-

tiffs were bound to act. It is true that the word cheque does not occur in the "*Code de Commerce*", and it was said at the bar by the defendants' Counsel that the thing only came into existence in the year 1865, when the special law on the subject above referred to was passed. Mr. de Germiny in his report on that Law to the Senate (see *Bidarride des cheques*, page 7) says: "nous n'avons depuis longtemps le mot, mais nous avons la chose. Les mandats rouges et les mandats blancs, que la Banque de France réunit en carnets, et met aux mains des Banquiers, des Commerçants, de ses créanciers en compte courant, ne s'appellent pas des chèques, mais équivalent; ils ne servent pas moins à payer à vue, à solder des comptes par compensation, que les chèques dont les Anglais font usage. Or, durant l'exercice de 1864, des affaires à la Banque et de la Banque aux affaires, ces mandats rouges et blancs ont été les intermédiaires d'un mouvement dont le total, accusé par les livres de service, s'élève à 14 ou 15 milliards. Le Crédit Foncier, le comptoir d'Escomptes, le crédit mobilier, la société générale, le comptoir Donou, quelques Banques de Dépôt, presque toutes les maisons de Banque, mettent à la disposition de leurs correspondants des reçus reliés aussi en carnets, faciles à détacher successivement et qui font à merveille et très rapidement l'office du chèque anglais." It is apparent in short that as soon as Banks of deposit existed, there must have come into use mandates to pay, which are in truth cheques, so as to uplift money from the Bank. Hence we expect to find, and we do find doctrine on the law of mandates to pay, or cheques, in the French Commentators. Accordingly "*Pardessus*" who is an early writer, publishing the first edition of his "*Cours de droit commercial*" about 1812, treats of "*mandats*" as imperfect bills of exchange, and lays down the principle that the parties to such a mandate, if it has been drawn out to order, subject themselves to all the obligations of parties to perfect bills of exchange. He says: "Si le mandat a été créé à ordre, nous sommes portés à croire que les contractants ont voulu se soumettre l'un à la garantie, l'autre aux conditions requises pour l'exercice de l'action en garantie des lettres de change parfaite".

At this early period then this great authority assimilated cheques to Bills of Exchange, and put them under the same law, at a later period in 1850 we find Dalloz in his "*jurisprudence Générale, Effets de Commerce*, Par 915" distinctly laying down the prin-

ciple that in default of presentation within the delay fixed by the 160th section of the Code de Commerce the same forfeitures for mandates should be incurred. His words are: "Lorsque le mandat est fait payable à vue, ou un certain temps de vue, il est soumis au principe que nous avons exposé pour les lettres de change conçues de cette manière, par analogie, on appliquerait les mêmes échéances, faute de présentation dans les délais fixés par l'article 160 Code de Commerce à moins de stipulation contraire." To these authorities must be added that of Alauzet writing in 1879 in his "*commentaire du Code de Commerce*", Vol. 4, Par. 1577 when treating of cheques and the law of 14th June 1865 in his general preliminary observations, he says "Nous devons enfin poser en principe et comme règle qui ne peut recevoir aucune exception que dans tous les cas où la loi spéciale sur les chèques n'est pas explicite, il faut se reporter au Code de Commerce et aux règles posées par lui en ce qui concerne la lettre de change, les articles 110 et suivants Code de Commerce forment le droit commun et les prescriptions que le texte peut soulever doivent être résolus de la même manière qu'il s'agit de chèques ou de lettres." These authorities might be added, but these need for my purpose to show that 70 years past at least the law upon cheques has been assimilated in France to that upon Bills of Exchange. Now the 160th section of the Code de Commerce deals with the right and duties of the holder of a Bill of Exchange and it is there enacted that the holder must demand payment or acceptance of it within six months from its date under pain of losing his recourse on the indorsers and even on the drawer if the latter has provided for its payment. This very long delay of six months was reduced by a law passed in 1862 to three months, and the necessity of enacting a prompt realization for cheques is stated by all writers as the chief ground for passing the special law on cheques in 1865. By the 5th article of that law the holder of a cheque is bound to demand payment thereof within five days, inclusive of the day of its date, if the cheque is drawn in the place where it is payable, and if that be not done he loses his recourse against the drawer, if the provisions for the payment has perished by the fault of the drawee after this said period of five days. The above slight sketch of French jurisprudence would be incomplete without reference to the "*Exposé des motifs*" of the law of 1865 to be found in *Sirey Villeneuve* for that year at page 45 of "*Lois annuées*" Mr Darimon who made the report to

the Commission of the "Corps Législatif" in dealing with article five and the delay of presenting cheques, says the 5th article of the new law fixes most completely the difference which it was desirable to place between the cheque and the Bill of Exchange. He then refers to the long delay granted to bills by the 160th article of the Code de Commerce and adds: "On n'a jamais pu songer à accorder au porteur du chèque des délais aussi longs. Outre qu'il leur serait inutiles, ils changeraient complètement la nature du chèque, qui n'est pas destiné à une longue circulation." These are the words neither of a judge, nor a Commentator on the law but of a legislator enforcing a particular view which he wished to become law;— Now this special law by which five days were allowed to present a cheque does not apply to Mauritius. But while I wish to guard myself from laying down law, that a cheque may be kept in circulation for six months, and be then presented in time for payment, on the other hand it seems to me impossible to hold that when we are administering a law which substitutes in place of the english rule of reasonable diligence, a fixed period of time, after which alone forfeiture occurs, a delay of 48 hours should be considered unreasonable and should entail a forfeiture of the creditor's claim against the debtor.

To sum up the argument in this judgment, the delivery of a cheque does not constitute novation of the debt, but is purely and simply an indication of the person who is to pay in the debtor's room as regulated by article 1277 of the Civil Code. The delivered cheque will operate as payment if it be subsequently paid. But it is held never to have been granted and the debt exists to all intents and purposes, if the cheque be not paid. However the holder cannot be freed from responsibility resulting from his fault and fault exists if he has not demanded payment within the delay fixed by law. But in Commercial community where, in the case of a Bill of exchange, recourse is preserved if payment be demanded within six months, and where the law of cheques is assimilated to that of Bills, it is clear that forfeiture should not be involved by a delay of 48 hours.

I am therefore of opinion that the plaintiffs are entitled to judgment, as concluded for, with interest at the rate of 12 per cent from the 12th May last, with costs.

## SUPREME COURT

CLAIM OF PAYMENT OF OBLIGATORY WRITING  
—COURT REFUSES TO ENFORCE ITS JUDGMENT BY CAPTION OF THE BODY UNDER ART. 5 OF ORD. 16 OF 1869 AS NO EMBEZZLEMENT OR FRAUDULENT APPROPRIATION OF MONEY HAD BEEN PROVED.

*The Plaintiff claimed from the Defendant payment of the sum of Rs. 6,000 which the Defendant acknowledges to have remained in his hands as mandatory of the Plaintiff, out of the proceeds of the sale of landed property; 2o. that judgment of the Court be enforced by caption of the body under Ord. 16 of 1869 Art. 5.*

*The Court gave judgment for the Plaintiff with regard to the amount claimed, but declined to order imprisonment, as the Court failed to find that the Defendant, under the circumstances disclosed, had been guilty of embezzlement or fraudulent appropriation of money.*

ROSSFORD THE WIFE,—Plaintiff

versus

LANGLOIS,—Defendant

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor JOHN ROUILLARD,—Acting  
Puisne Judge

G. GUIBERT,—Counsel for Plaintiff  
A. ROHAN,—Attorney for the same.

THE HONORABLE W. NEWTON,—Counsel for  
Defendant.

E. LEBLANC,—Attorney for the same

Record No. 22,313.

29th August 1884.

The plaintiff's action is founded on a writing obligatory dated 25th July 1883, by which the defendant bound himself to pay to plaintiff, by certain instalments which have fallen due, a sum of Rs 6,000, which the defendant acknowledges to have remained in his hands, as mandatory of the plaintiff, out of the proceeds of the sale to the Colonial Government of an immoveable property in Port Louis.

The defendant confessed judgment, but as the plaintiff further prayed that the judgment of the Court be enforced by caption of the body, the question arose whether, under Article 5 of Ordinance No. 16 of 1869, this Court had power to decree imprisonment against the defendant. After due consideration of the reasons urged by the plaintiff, the Court thinks that this case, such as it now stands before us, does not fall within the provisions of Ordinance No. 16 of 1869.

It must be observed, in the first place, that the imprisonment decreed in certain cases, by Ordinance 16 of 1869, for the recovery of a judgment, is of a *quasi* final nature, it follows as a consequence that the provisions of that Ordinance respecting imprisonment must be construed strictly, and unless the defendant is shown to be within one or other of the cases in which imprisonment may be decreed, the Court must refuse the prayer of plaintiff.

The plaintiff urged that the defendant was liable to imprisonment under article 5 of Ordinance 16 of 1869, which runs as follows :

"It shall be lawful for the Supreme Court to decree that its judgments shall be enforced by imprisonment whenever the said Court shall have condemned to the restitution of money any person who shall have embezzled, fraudulently appropriated or employed, squandered away or destroyed to the prejudice of the owner.... any money etc."

Now the judgment prayed from the Court in this instance is not for the restitution of any money or property. Whatever the facts which have taken place previously, the plaintiff does not found her claim on them, but on a writing obligatory, by which the defendant bound himself to pay a certain sum of money by certain instalments, and it is that undertaking by defendant which the plaintiff seeks to enforce by a judgment of this Court. But, not only must the Court, in terms of Art. 5 of Ord. 16 of 1869, condemn a defendant to restitution of money, but it is a necessary condition that the money should have been embezzled, fraudulently appropriated or employed. In the declaration, no mention is made of embezzlement, or of fraudulent appropriation, but, apart from the question whether the omission to state these facts in the declaration may not be a bar to the plaintiff now raising these points, the plaintiff has made a more important omission, which is to prove to the Court that there has been on the

part of the defendant, embezzlement or fraudulent appropriation of money.

The only fact invoked against the defendant, is that according to the document bearing date 25th July 1883, a certain sum of money, the proceeds of a sale, remained in the hands of defendant. But there is no evidence to show that the money was kept against the will, express or implied, of the plaintiff. Nay more, as matters stand before us, the hypothesis is even admissible that the plaintiff allowed the defendant to keep the money received by him.

The Court cannot, under the circumstances disclosed, find that the defendant has been guilty of embezzlement or fraudulent appropriation of money without which, imprisonment cannot be decreed.

Judgment will be entered for plaintiff for the amount claimed, but the prayer for caption and imprisonment must be refused for the reasons given above.

Costs against the defendant, except those of the argument of the question of imprisonment, which shall be borne by the plaintiff.

## SUPREME COURT

COMMISSION, CHARGES AND ADVANCES CLAIMED ON CERTAIN GUANO HANDED OVER TO FRANCO EGYPTIAN BANK IN ABSENCE OF BILLS OF LADING, BUT SUBSEQUENTLY CLAIMED BY MESSRS ELIAS, MALLAC & CO. UPON THE BILLS OF LADING.—"NEGOTIORUM GESTOR."

*In this matter a cargo of guano was imported into the Colony by the vessel "Dilbhar," which in the absence of Bills of Lading, and in accordance with a request conveyed to the captain of the vessel, was handed over to the Franco-Egyptian Bank.*

*In addition to this, four other cargoes of guano were received by the said Bank.*

*Later the Bills of Lading reached Mauritius when it was discovered that they had been endorsed to Messrs Elias, Mallac & Co., who claimed delivery of the guano from the manager of the Franco-Egyptian Bank, and not being successful, they claimed it from*

*the captain of the "Dilbhur" who, by this action, claims its return from the Franco-Egyptian Bank.*

*At the first instance the Bank was not disposed to part with the guano, but subsequently the manager of the Bank consented to hand over the cargo of the "Dilbhur", as well as the other four cargoes, provided Messrs Elias Mallac & Co. refunded to the Bank certain advances it had made, and paid certain commission and charges it claimed.*

*The contention of the Bank was that it was entitled to 5 o/o commission on the value of the five cargoes, or to about Rs 100,000; that it had acted in this matter as negotiorum gestor to Messrs Elias, Mallac & Co. with all the rights and remedies of an agent against his principal.*

*The commission was claimed in virtue of an agreement between the Bank and its principal. By another witness it was based upon the 18th article of the Rules of the Chamber of Commerce which allows 5 o/o on affairs in dispute.*

*The Court held that the latter ground could not be admitted, and that a contract between the Bank and its principal could not bind third parties: even if the Bank had acted as negotiorum gestor there were authorities against the payment of commission, and still more must this rule hold good when, as in the present case, the agent believed that he was acting for himself.*

*The item is disallowed.*

*The next item objected to by Messrs Elias, Mallac & Co. is interest on advances at 9 o/o from the date they were made, up to date of furnishing particulars of the claim; and presumably claimed up to the moment of payment.*

*Messrs Elias, Mallac & Co. contended that they had never asked the Bank to advance money for them.*

*The Court allowed interest up to the day when Messrs Elias, Mallac & Co. claimed delivery of the guano.*

*The next item is one for storage which is claimed at 40 c. per ton per month. This was objected to by Messrs Elias, Mallac & Co. as it was proved that for continuous*

*business, Docks and Warehouses only claim 31 c. per ton per month.*

*The Court disallows the difference of 9 c. per ton per month.*

*The last items contested were for weighing and cartage, but these were allowed by the Court as, in the absence of Bills of Lading, it was necessary to cart and weigh the guano, in order to pay the freight.*

*The Court further ordered that the account between the parties be adjusted on these findings within 8 days.*

*Further that within 14 days one fifth of the cargo of the "Dilbhur" be handed over to Messrs Elias, Mallac & Co., they paying before delivery one fifth part of the defendants' account of expenses as amended by the judgment, and so on one fifth weekly.*

*The plaintiff is allowed all his costs.*

*Messrs Elias, Mallac & Co. half their costs from the defendants.*

NORRIS,—Plaintiff

versus

COMPAGNIE FINANCIÈRE DU PACIFIQUE,—Defendants.

and

ELIAS, MALLAC & Co.,—Intervening parties.

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Acting Puisne Judge.

—

V. DELAFAYE,—Counsel for Plaintiff  
A. J. COLIN,—Attorney for the same

Hon. W. NEWTON,—Counsel for Defendants  
E. SAUZIER,—Attorney for the same.

P. L. CHASTELLIER,—Counsel for the Intervening parties  
A. J. COLIN,—Attorney for the same.

Record No. 22488.

16th September 1884.

The "Dilbhur" arrived in Mauritius on the 14th March 1884. This was a vessel which had been chartered in Paris, on the 9th June 1883, by the defendant's Company to load a cargo of guano at one of the Guano deposits on the West Coast of South America. The ship by the terms of the charter party was, after completing her loading to proceed to Port Louis, Mauritius, and there according to Bills of Lading and Charter-Party, she was to deliver her cargo. The freight stipulated was to be paid at the Charter-Party clause 8th rate of 47sh. 6d. British sterling in full per ton of 2240 lbs. British or kilo. 1016 net weight. By the 22nd clause the freight was to be paid subject to the terms and conditions of the Charter party in the manner following viz: £ 1 per ton on the estimated cargo in cash on arrival at the port of discharge, three months interest being deducted, and the balance after deduction as therein mentioned 48 hours after the true and right delivery of the whole of the cargo. When the ship reached Mauritius the Bills of Lading had not arrived there. It has been explained and it was known to the Branch of the Franco-Egyptian Bank in Mauritius, the defendants' agents here, that certain difficulties had arisen between the Government of Chili and the defendants. But the express nature of these difficulties does not seem to have been known, and it was fully expected that the Bills of Lading, when they did arrive, would be drawn out or endorsed in their favor; accordingly the defendant's agents dealt with the ship "Dilbhur" as if the bills of Lading in their favor had arrived. The Captain of that ship who is the plaintiff in the present action received on his arrival a letter dated Paris 11th February 1884, in which they request the Captain to take as his agents the Franco-Egyptian Bank, their representatives at Port Louis, and another letter dated 18th March 1884 addressed to him by the officials of the Franco-Egyptian Bank, in which, referring to the letter they had forwarded to him from the defendant's Company, the charterers of the "Dilbhur" and whom they represented at Mauritius, they beg of him, conformably to the instructions contained in that letter, to deliver to them the

cargo of guano on board his ship, as they say, is directed by the Charter Party. The letter then proceeds as follows translating it into English "it is quite understood that not having yet in hand the bills of lading of the "Dilbhur" we bind ourselves to hand them "to you as soon as received, and we free "you in the name of the defendants from "all responsibility, holding your Charterers "responsible on any grounds if you are troubled for a delivery which is not of a strictly "regular nature". In a postscript to this letter they further bind themselves at the request of the Captain "to hand over to Messrs Ireland, Fraser on your account, the Bills "Lading when they will reach us if you have "then left the Colony and we bind ourselves "not to dispose of the guano which you will "have delivered to us before having put you "en règle". On receiving these letters the Captain delivered the Guano to the defendants' representatives in Mauritius and received payment of the freight. The guano from Peru and Chili had been usually stored in Mauritius in the Warehouses of the "Albion Dock Company" which, when large quantities were stored and a continuous business anticipated, received it at the rate of R. 0.3 per ton per month. The Bank Agent, Mr Bloch, however, having received instructions from the defendants' Company, in France, not to store the guano sent by them to him with the Albion Dock Company, which company had been the Warehousemen of the previous agents of Peruvian guano, made a contract on 21st December 1883 with Messrs. R. Barnard & Co. for the storage of all the cargoes of guano which he expected to arrive at the rate of R. 0.40 per ton per month. The cargoes not only of the "Dilbhur" but of four other ships were unloaded and stored at the rate now last mentioned with Messrs. R. Barnard & Co.

The Bills of Lading of the "Dilbhur's" cargo reached this by the Mail of the 1st May 1884, endorsed to Messrs. Elias, Mallac & Co. The Bills which were made out in favor of the Government of Chili or to their assigns had been endorsed to their "ministère" in France, and by him to the order of the "Compagnie Commerciale Française" who again had endorsed them to the order of Messrs. Elias, Mallac & Co.; on receiving them this latter Company demanded delivery from the Manager of the Franco-Egyptian Bank of five cargoes of guano which he had received by different ships, one of these being the "Dilbhur" and of which they tell him they held the Bills of Lading. To this the manager on the 2nd May 1884 replied he had no instructions to

ver the cargoes to them. They also demanded delivery of the cargo now in question to the Captain of the "Dilbhur", who was still in Mauritius, and he in his turn made a demand upon the Franco-Egyptian Bank. The Bank on the 6th May 1884 returned his reply to the Captain of the "Dilbhur", "wanting time to consider the contents of your letter, we beg to inform you that we shall fully answer tomorrow". No answer, however, was made by the bank, and on the 15th May following, the plaintiff raised the present action against the defendants asking a judgment condemning them to deliver back to his Agent in this colony the quantity of 1,901,020 kilograms of guano set forth in the Bills of Lading as shipped on board the ship "Dilbhur".

To this action the defendant pleaded that the only obligation they lay under was to guarantee the plaintiff against the consequences of any action which may be taken by third parties against him, in consequence of the delivery of the guano to them without the Bills of Lading having been given to the plaintiff, which obligation they were ready to perform, and that the plaintiff was not entitled to demand the delivery of the guano to him; the defendants further denied that they had received the guano by error, and averred that, acting as General agent in Mauritius of the defendants' company, the said Franco-Egyptian Bank was the sole party entitled to receive the cargo of Guano, and that they as defendants were alone entitled to introduce into this Island and sell therein natural guano.

The defendants then proceed to narrate the contract between themselves and the Government of Chili, and to explain that differences have arisen in its execution and that the "Compagnie Commerciale Française" in whose name Messrs Elias, Mallac & Co., were acting, were perfectly acquainted with the state of matters mentioned, and that the assignment by the Chili Government to any other Company or individual of any right in guano coming from the said place and particularly the Cargo ex "Dilbhur" was altogether null and void.

This plea was served on the 28th May last, after a replication to it had been lodged, the defendant craved leave to withdraw that plea and to substitute another for it in which they express their readiness to return the Cargo of guano to Messrs. Elias, Mallac & Co., "provided that the said firm do pay

"to the said defendants *previous to such delivery of the said cargo* any sums of money "paid by the said defendants for the freight, "landing, storage and other charges and expenses" and they further prayed that Messrs Elias, Mallac & Co., should be ordered to intervene in this suit, in order that they might take delivery of the said cargo and make the aforesaid payment. The particulars of the defendants claim was at the same time ordered to be served on the plaintiff, and thereafter Messrs. Elias, Mallac & Co., intervene in this action, their intervention being consented to by the parties, and claimed delivery to themselves of the Guano, they undertaking to pay to the defendants, on the said cargo having been delivered to them, the amount of the defendant's account, less the item of weighing, carting, commission and interest as not due and not proper charges, and a sum of nine cents per ton to be deducted from the item for storing, which should be thirty one cents instead of forty as charged.

They at the same time offered to pay the contested items into the Registry, to abide the decision of the Court "or otherwise to take "delivery in such a manner and on such "terms as to payment as the Court, considering the circumstances of the case, and the "nature of the merchandize, shall, in the "exercise of its discretion, think fit and proper to direct."

At the hearing of the case, after a proof had been led by both parties, in which the defendants were made the plaintiffs in the issue between them and Messrs. Elias Mallac & Co., a very careful and able argument was submitted to the Court on the questions respectively maintained by them. The defendants' Counsel argued that his clients had acted in the circumstances as a "*negotiorum gestor*" towards Messrs. Elias Mallac & Co. with all the remedies and rights of an agent against the principal — that in any view they were "*bona fide*" possessors of the guano, and entitled to retain it until the claim was paid in all its items. The Counsel for the intervening parties on the other hand denying that the present was a case of "*negotiorum gestio*" maintained that the only action competent to the defendants was that known under the roman and under the french system of law as "*De in rem verso*", and with great urgency objected to the items for commission, interest, storage, weighing and carting.

The quasi-contract founded on by the



defendants is well known under the title of "*gestion de l'affaire d'autrui*". The very words employed indicate that there is to be management of another's affairs. Usually the case will occur, when the principal is temporarily or permanently absent from the spot, when events take place which require some friend or stranger to interfere in them, and act so as to preserve them for the owner. But in the present instance the defendants believed they were attending to their own property, and every step they took was indicative of that belief. The guano arrived in a vessel chartered by them, they claimed delivery of it as their property, they expected to receive the Bills of Lading, for they bound themselves to deliver them to the plaintiff as soon as they received them, and even after action had been raised against them in virtue of the Bills of Lading, which had come into other hands, the defendant acting thro' the Bank pleaded that any contract, by which guano could be received and sold in Mauritius by any other person than themselves was null and void. In these circumstances there is no doubt they believed they were managing their own affairs in their own interest and they intended to do so. We are well aware that there are two schools of jurists on this matter, one of which bases the doctrine of "*negotiorum gestio*" entirely upon the fact of the management of another's affairs, and maintain that intention has nothing to do with it. But the texts of the law which speak of these quasi contracts as "*les faits purement volontaires de l'homme*" and which go on to describe the special contract we are considering as a "*gestion de l'affaire d'autrui volontairement*" seem to involve in the idea an acting by choice and with a purpose and intention. The framers of the Code no doubt have kept in view in this, as in many other articles dealing with the law of contracts, the doctrine of Pothier, who maintains that this quasi contract exists only in perfection when the gestor has had the intention of managing the business of a third party and with the clear intention of claiming from that party the expenses of his management. We therefore think that the view of these commentators on the code who hold that intention is an essential element of quasi contract though not entirely conclusive, is the better opinion and ought to prevail. It is true that we were referred to a decision of the Court of Cassation (Dalloz jurisprudence générale 1872, par. 1, page 471) in which that Court held in principle that the obligations, which arise out of this quasi contract spring from the fact of the "*negotiorum gestio*" itself and from the law

and not from the intention of the parties. But having carefully considered that judgment, we think that the laying down of that principle was not really necessary to the decision and we agree with the criticism of Laurent thereon (Vol. 20, art. 323) who says of it that it is too absolute and that it goes beyond the text of the Code. He justly adds "L'art. 1370 dit que le quasi contrat se forme sans convention, mais il ajoute que les engagements qui en résultent naissent d'un fait personnel et ce fait est un fait volontaire. La volonté joue donc un rôle dans la gestion d'affaires, or la volonté, c'est l'intention de celui qui gère. Il faut donc qu'il ait l'intention de gérer l'affaire d'autrui si non l'on ne conçoit pas de gestion d'affaires". We hold then that the intention and purpose of the "*gestor*" is one of the conditions which enter into the very existence of this quasi contract and that the officials of the Bank, the defendants representatives here, having acted entirely in their own interests, had no idea of acting on behalf of any third party.

But this is only one element of the quasi contract, and we proceed to remark that one of the essential ideas connected with it is in the opinion of all commentators on the subject that it is what is called in French a "*Bon office*", that is to say that the gestor takes upon himself the management of another's affairs from a sense of friendship and benevolence. The usual case in which it takes place is when, in consequence of the absence or other incapacity of the principal to attend to some business, which unexpected by him suddenly arises, a friend or even a stranger out of kindness and a desire to help or oblige, steps in, and takes preservative measures which the principal could not do himself. How with any propriety can it be said, that a "*negotiorum gestio*" has taken place in the case of two persons resident in the same town, each attending to his own affair or affairs believed to be his own, and each in so acting interested in his own behalf? Where is the friendly or benevolent feeling which should exist so as to create this quasi-contract. The truth is that the Bank officials acted entirely for themselves believing they were managing their affairs and by which profit would be made for the Bank and the defendants' company represented by it. It was in short a speculation for themselves, without the intention either of benefiting or attending to the interest of any other party, and we cannot hold, looking to all the circumstances that from them any right has arisen to them in virtue

the quasi contract of "*negotiorum gestio*". But if that quasi contract, in all its completeness does not apply to the circumstances of this case, there must be some principle on which the claim of the defendants for reimbursement of their outlays and advances must be based. Natural equity requires that no one shall be allowed to expend these without a right of reimbursement. There must be a supplementary action, when the judicial facts do not combine all the elements of the quasi-contract of "*negotiorum gestio*" and yet there has been in fact a management of the affairs of another as Larimbière says (obligations, Vol. 5th Art. 1375 Par. 167) "*Quels sont ceux qui dans l'hypothèse d'une gestion d'affaires ont complètement l'action de 'in rem verso'.*" Ce sont ceux qui par le fait et sans le savoir ont géré la chose d'autrui, ou qui, agissant avec connaissance l'ont géré en vue de leur intérêt personnel". We have used the words "natural equity" and the principle these words involve is just this, that no one ought to enrich himself at the expense of another, if another has managed my affairs, believing he was managing his own, I am naturally bound to reimburse him *quatenus locupletior factus sum*.

One great distinction between the complete and perfect action "*ex negotus gestis*" and this auxiliary action of "*De in rem verso*" is that in the former all expenses which have been useful and necessary at the time they were made must be repaid by the principle, whereas in the latter it is but just that the utility and necessity of the expenses incurred should be tested by the position of matters at the time action therefor is brought.

On the question of the right of retention claimed by the defendants, we think it enough to say that though no test of the Code embodies the principle, and though it seems more properly to be exercised in bilateral contracts, yet taking as our guide many analogies in the Code (see Art. 267, 1948 &c.) we think that a possessor in good faith should have the right in question. He has the custody and control of the article, he in good faith has made advances and expended money on its preservation, and in equity seems entitled to retain it until all his just claims thereon are paid. But we think it right to add that we do not attach much importance to this right in this case, where the debtors in the claim are men of high standing and eminent position in the commercial world and well able to fulfil every claim which may be made against them. The right of retention is chiefly

of importance where there is a competition of creditors and a party has to rely on that right to obtain full payment.

Having thus determined the principles of law applicable to the case we come now to dispose of the special objections made to the defendants' account of charges, and first of Commission. In the defendant's account it is thus stated "5 o/o Commission sur la valeur de la cargaison Rs 1,915,085 à Rs 170 o/oo kos... Rs 16,278.22" and the amount of this item of the defendant's claim on the whole five cargoes which came into defendant's hands comes up as was stated at the Bar to about Rs 100,000.

The agent of the Bank here in his evidence puts this head of the claim on this footing; that Commission is due to the Bank in virtue of an agreement between the Bank and the "Compagnie du Pacifique," while Mr Dixoné one of the Bank's chief employés, says he makes the claim in virtue of the 18th Article of the rules of the "Chambre de Commerce" which gives 5 per cent on affairs in dispute. The evidence of a witness beyond question shows that the latter ground cannot be for a single moment admitted, while in regard to the former ground it is clear that a contract between the Bank and its principal can never bind third parties.

But the true question is, was this claim for commission either necessary or useful to Messrs Elias Mallac & Co.? In answering it, we have to remember that we have already found that the defendants acted in their own interest and believing that the bills of lading would come to them made out in their favour. It is impossible to conclude, if we are right in that, that the Bank did any work for Messrs Elias Mallac & Co. which implies a right of remuneration. On the contrary the Bank's action has been prejudicial to Messrs Elias Mallac & Co., because they have been deprived of an important article of trade since the 1st May last, and have not been hitherto able to sell it, and obliged to buy other guano for the Estates for which they are agents. Even in the case of a perfect act of *negotiorum gestio* authors like Demolombe and Laurent clearly lay it down that commission is not due. The former says (Vol. 31 art. 173) : "En principe le gérant n'a pas droit à un salaire, à une rémunération, et il ne peut porter de ce chef aucune somme sur son compte. Le mandat est gratuit. Or la gestion d'affaires est une imitation du mandat d'où il suit qu'elle est gratuite aussi bien

"que le mandat." Still more must this rule hold when the gestor has undertaken duties for his own interest and believing that he was managing his own business. We therefore disallow this item entirely.

The next item objected to by Messrs Elias Mallac & Co. is that of interest which is charged at 9 o/o from the date of the advances up to the date of furnishing the particulars of the claim and presumably claimed up to the moment of payment.

This item is objected to because Messrs Elias Mallac & Co. never asked the Bank to advance money for them. No doubt it is usual in commercial matters to allow interest on all advances made by one who disburses money for another, because the latter gets the advantage of the money paid by him who has advanced it. Nor is it a sufficient answer to say that Messrs Elias, Mallac & Co., could have paid the money themselves if the guano had come into their hands. There is no doubt such a firm can employ money profitably and as they did not pay the freight themselves they had so much more to trade with otherwise. But we cannot carry this view further than to hold that interest will be due from the date of advance until Messrs. Elias, Mallac & Co., claimed delivery of the guano themselves, at which date they would be prepared then selves to pay all charges. This was done by a letter addressed by them to the Manager of the Bank, on 2nd May and we accordingly sustain a charge for interest up to that date but disallow it thereafter. We come to the item of storage which is claimed at the rate of R 0.40 per ton per month. Though the proof shows that various prices are enacted for storing guano, if it be a single transaction, yet it is completely proved that if a continuous business was offered to the Docks and Warehouses, the price charged has been invariably for years R 0.31 per ton per month. The reason given for selecting Barnards & Co's. Warehouse, that defendants had given orders to their representatives here not to store the guano sent them in the Warehouse where the former agents of the Peruvian Government had been in use to do so, is obviously one with which Messrs. Elias, Mallac & Co., have nothing to do. The additional charge of nine cents is one which has been neither useful nor necessary for them and so viewing the matter the charge to that extent cannot be sustained. The last objections to be considered are the items of weighing and carting. It is objected that Messrs. Elias, Mallac & Co. must again weigh the

guano to see that they get that which they are entitled to, and recart it to the Warehouses of the Albion Dock, where they have every guarantee for its preservation, and that if these items are held good charges in the Bank's account, they will pay them twice. On the other hand it is apparent that in order to pay freight it was necessary also to cart when the ship was being unloaded. But whether there was no apparent owner of the guano on the spot, as the Bills of Lading had not arrived in Mauritius, and it was necessary to pay freight and weigh and cart the guano without them; any how the guano in the absence of the Bills of Lading for seven weeks had to be unloaded, carted, weighed and stored. It is admitted that freight is due and payable by Messrs. Elias, Mallac & Co., and it seems to follow as consequent upon that, and as necessarily connected with the freight, that the weighing and carting must be done and payable by them. Of course it is in the power of Messrs Elias, Mallac & Co. to remove the guano from the Warehouses where it now is, it being their property and they have a right to deal with it as they please. It is right to say that the Court feels no reason given by them for changing the Warehouses is one which would not justify its refusing to validate this charge. Barnard & Co's warehouse is a public dock and warehouse (Ordinance 12 of 1871) and certified by the Chamber of Commerce and the proper officer as sufficient for the storage of all imported articles and security has been found by them for the safe custody of these. We cannot hold that because the one is a private concern and the other a public company with a board of directors, that there is any such superiority in the latter system that it would be absolutely necessary to remove the guano from the one to the other. We therefore sustain the items of weighing and carting as good and valid items in the account.

With these findings the parties will be easily able to adjust the account, and the Court appoint that to be done within eight days from this date by the defendant's representatives in Mauritius and thereafter to present the said account as amended to the intervening parties.

The Court is aware that the nature of this article of trade is peculiar and that it requires care in its preservation. We are aware also that questions may still possibly arise between the parties, the charges on five cargoes are in dispute, that large sums of money have to pass from one party to the other. We

herefore ordain the defendants and their representatives, in fourteen days from this date, to deliver over one fifth part of the cargo of guano ex "Dilbhar" to the intervening parties Messrs Elias Mallac & Co., they paying before delivery one fifth part of the defendants' account of expenses as amended by this judgment, the said delivery being either actually made or by a transfer of the Dock Warrants of Messrs. Barnard & Co. to Messrs. Elias, Mallac & Co. and the registering of the said transfer in the book kept for that purpose by the said Barnard & Co. and so on one fifth part weekly thereafter, payment of each fifth part being made weekly before delivery with the additional proportionate charge for storage at the same rate as fixed by this judgment.

As to costs, the Court is of opinion that the plaintiff is entitled to the whole of his costs, and Messrs. Elias, Mallac & Co. to one half of theirs from the defendants.

### SUPREME COURT

CLAIM OF A WIDOW TO AMOUNT OF POLICY OF INSURANCE OF HER LATE HUSBAND IN FAVOR OF THEIR CHILDREN AND WHICH AMOUNT THE DECEASED HAD DESIRED SHOULD REMAIN IN THE HANDS OF THE COMPANY UNTIL THE CHILDRENS' MAJORITY.

*The plaintiff's husband insured his life in the Whittington Life Assurance Company for Rs. 12,000 in favor of his four minor children, and authorised the Company in case of his death to retain the amount of his policy until the children obtained their majority, stipulating that they should in the meantime receive the interest of the amount.*

*The husband died in Australia six months after having insured his life. His policy had, in the interval, been accepted by the Company, but nothing was said with regard to his desire that the amount of his policy should be retained until his childrens' majority.*

*The agent in Mauritius for the Company expressed his willingness to pay the amount of the policy, but under the circumstances asked for an order of Court to pay it to Mrs Bonnefin or her agent.*

*The Court ordered the amount to be paid into the Registry of the Supreme Court.*

*As it was shewn that Mrs Bonnefin was in destitute circumstances in Australia, and had incurred debts for her family, the Court authorised Rs 4,000 to be paid to her representative, and ordered the remainder of the sum to be invested by Mrs Bonnefin or her agent upon security of mortgage in such a way as the sub-guardian of her minor children will approve of.*

*Costs to be paid out of the Rs 4,000.*

—  
WIDOW BONNEFIN,—Plaintiff

versus

THE WHITTINGTON LIFE ASSURANCE COMPANY & anor.,—Defendants

—  
Before

HIS HONOR EUGÈNE JULES LECLÉZIO,—Chief Judge

and

HIS HONOR J. ROUILLARD,—Acting Puisne Judge

—  
G. GUIBERT,—Counsel for plaintiff  
H. BERTIN,—Attorney for the same

HON. W. NEWTON,—Counsel for defendants  
E. DUVIVIER,—Attorney for the same

V. KIVERN,—Counsel for the sub-guardian of the minors Bonnefin  
E. GANACHAUD,—Attorney for the same.

—  
Record No. 22558.

19th September 1884.

On the 10th of January 1883, the late Alcide Bonnefin made an application to the agents in Mauritius of the Whittington Life Assurance Company, for a Life Assurance of Rs. 12,000 for the benefit of his four children, specially named, and in a separate document, he authorized the Whittington Life Assurance Company on his death occurring, to keep the amount of the Policy of Assurance, paying only the interest of the capital

until the coming of age of his children. Alcine Bonnefin appears to have subsequently left Mauritius for Australia, where he died on the 9th June 1888.

In the interval, his application for Assurance was accepted at the head office of the Company in London in the usual form, no notice however being taken of the offer made by the applicant to the Company to keep the amount of the assurance until the coming of age of his children. Mrs widow Bonnefin is still in Australia with her children, of whom she is the legal guardian and is here represented by Edouard Restel. On the latter applying for the payment of the assurance, the Whittington Life Assurance Company, whilst fully admitting their liability, came into Court, asking, under the peculiar circumstances of the case, for an order authorising them to pay the amount of the policy to Mrs Widow Bonnefin or her agent.

After hearing parties and after reading the written conclusions of the 'Ministère Public', the Court ordered the amount of the policy of assurance, less certain sums which were to be deducted therefrom, to be paid into the Registry of the Supreme Court and further ordered the proceedings to be served upon the sub-guardian of the minors Bonnefin, in order to allow him to intervene in the matter if he thought proper to do so.

At the further hearing of the case, Mr K/vern, of counsel for the sub-guardian, strongly urged that, in presence of the clearly expressed wish of the deceased which was that the amount of the policy of assurance should not be paid to the guardian of his children, but should remain safely invested until the majority of his children, the Court should take some steps in furtherance of that view. It was also represented to the Court that the guardian was evidently in straightened circumstances, that she had no immoveable property by which the right of her children might be secured and by way of legal mortgage, that she was out of the jurisdiction of the Court and that it would be absolutely impossible for the sub-guardian, under the circumstances, to see that the money should be properly invested by the guardian. On the other hand, it was contended for Mrs Bonnefin that the law gave to the judges no power to interfere, without good cause shown, with the exercise of her rights as legal guardian of her children,—that the only fact alleged against her was her present state of destitution, which resulted,

as she alleged, from her husband having died in a foreign land leaving his family unprovided for, but that this was no bar to her receiving by proxy, payment of any money due to her children. There is no doubt that a guardian is, in principle, entitled to receive payment of sums of money due to his ward.

The position of a father or mother, when a legal guardian, is even stronger in that respect, inasmuch as to the right of legal guardianship is added the usufruct or "*jouissance*" of the interest on the capital belonging to the minors. There are however precedents where Courts of law in France, without interfering with the paternal authority of a guardian or his "*jouissance légale*", have taken steps to protect the property of a minor. An instance reported in "*Sirey Devilleneuve*" is quite in point (S. V. 1859, 2,344) where the Court of Douai has, in the case of a legal guardian who was notoriously insolvent, directed that a sum of money due to a minor should not be received by the guardian but invested in a particular manner so as to secure the property of the minor (see in the same sense S. V. 1841, 1. 651 & S. V. 1846, 2. 556). The circumstances of the present case are quite peculiar, for not only is the guardian absent from the Colony, and beyond the jurisdiction of the Court, but it is admitted that she has no property in Mauritius on which a legal mortgage might secure the rights of her children. These facts might perhaps not be by themselves sufficient, but the Court finds itself in presence of a wish clearly expressed by the deceased, that the amount of his policy of assurance should be secured and kept apart for the benefit of his children until their majority. It is quite true that the offer made by him to the Whittington Assurance Company was not accepted, and that he did not take any further steps to carry out the intention originally manifested by him, but it must be remarked that his death occurred in Australia five months after he had made his application in Mauritius. It is not shown that he became aware in the short interval between his application and his death, that the policy had been effected, but without the condition which he wished the Company to accept; at all events he can hardly have had time to consider the steps he ought to take, as a consequence of the refusal by the Company to accept his proposal.

Under the very special circumstances of the case, the Court considers it its duty to take some steps that may secure the property of the

minors, while at the same time inflicting no hardship on the plaintiff or her children, and reserving the right of the plaintiff to the "jouissance légale". It was represented to the Court that the plaintiff was at present in Australia nearly destitute, that she had no means of paying sundry debts incurred by her or her family, and that she wished to have the funds necessary to enable her to return to Mauritius, her native land.

It was further stated that a sum of Rs 4000 would be sufficient to satisfy the present wants of Mrs Widow Bonnefin, and to pay the expenses of this procedure. The Court gave authority to the representative of Mrs Widow Bonnefin to receive that sum from the amount at present deposited in the registry of the Supreme Court.

The remaining sum will have to be invested by Mrs Bonnefin or her agent, upon security of mortgage, in such a way as the sub-guardian of her minor children will approve of.

Cost of the parties in the case to be paid out of the above sum of Rs 4000.

### SUPREME COURT.

**APPEAL—CLAIM OF LAND—DECLARATION IN SHAPE OF A NOTARIAL DEED THAT A CERTAIN SALE OF LAND HAD BEEN EFFECTED CANNOT REPLACE THE ACTUAL DEED OF SALE.**

*This is an appeal from a decision of a District Magistrate.*

*The Appellant before the District Court, claimed an acre of land; and in support of his claim he produced a notarial Deed, by which the heirs Duportail declared that Mr. & Mrs. Duportail had sold an acre of land to the Appellant in 1865.*

*The magistrate ruled that this notarial Deed could not dispense with the production of the deed of sale of 1865.*

*The Court upheld the decision.*

**BEECARAM,—Appellant**

*versus*

**JOYPATTEN & wife,—Respondents.**

—  
Before

**His Honor EUGÈNE JULES LECLÉZIO,—Chief Judge**

and

**His Honor FRÉDÉRIC CONDÉ WILLIAMS,—Puisne Judge**

**Hon. W. NEWTON,—Counsel for Appellant**  
**H. BERTIN,—Attorney for the same**

**A. HUGUES,—Counsel for Respondent**  
**T. NICOLAS,—Attorney for the same**

Record No. 817.

26th September 1884.

In this case the Magistrate decided that the titles produced by the plaintiff were insufficient to authorize him to disturb the defendants, who had been maintained by a previous judgment in possession of an acre of land at Curepipe, and dismissed the case after the plaintiff had refused to elect for a nonsuit.

The deeds produced by the plaintiff are first a notarial deed by which certain parties styling themselves heirs Duportail, declared in 1883, that Mr & Mrs Duportail, their father and mother, had sold in 1865 an acre of land to plaintiff bounded as stated in the plaint, and secondly a deed of 1842 showing that Arthur Duportail had purchased a larger portion of land from one Vitaline Noirette.

The Magistrate found that the declaration of 1883 could not dispense the plaintiff with the production of the act of sale made in 1865 as alleged in the deed of 1883.

"We cannot find fault with the Magistrate for having so decided, for, as he very properly observed, the admission of such documents as complete proofs of sale, would, in many cases open the door to fraud."

The plaintiff, if he had elected for a nonsuit as offered, might perhaps have been able to show that the suspicions of the Magistrate, principally based upon certain apparent discrepancies between the notarial deeds and the acts of the Civil Status produced, were unfounded; he might have tendered other evidence to strengthen his case, but he preferred a dismissal, and as the record stands before us we cannot say that the Magistrate was wrong in his decision upon the points submitted to him.

With regard to the motion made by the plaintiff's counsel in the Court below after the Magistrate's decision on the value of the titles before him, for leave to proceed in the shape of an "action publicienne", we think that the Magistrate was right to refuse the application, for whether such an action is permissible in our system of civil law or not,—a question which we consider unnecessary to examine now,—we are of opinion that under the circumstances of the case before the Magistrate, it did not arise either from the pleadings or from the nature of the titles produced.

We must therefore dismiss this appeal with costs, but in doing so we think it right to give to the appellant another opportunity of electing for a nonsuit, if he considers that he has more complete evidence to prove in a satisfactory manner his ownership of the land claimed by him.

### SUPREME COURT

*In this appeal the Court ruled that the execution debtor in a case before a District Magistrate, and whose judgment was appealed from, should have been made a respondent, and that in his absence, the appeal could not be dealt with. As the delay within which notice of the appeal might have been given to the execution debtor had elapsed, the Court dismissed the appeal.*

COMTY,—Appellant

versus

LOIZEAU,—Respondent

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor FRÉDÉRIC CONDÉ WILLIAM,—

Puisne Judge

V. K/VERN—Counsel for Appellant.  
A. DESVEAUX—Attorney for the same.

A. TRIBAUD—Counsel for Respondent.  
J. MEROIER, Attorney for the same.

Record Number 818.

26th September 1885.

In this case which is an appeal from judgment of a District Magistrate the Respondent took a preliminary objection and contended that the execution debtor one Abraham, should have been made a party to the appeal as Respondent, he having been added as a party in the Court below.

The appellant argued that Abraham took no attitude before the Magistrate, and that his presence was not absolutely necessary in the interpleader case according to No. 91 of the Rules of District Courts, unless he was made a party to the cause by a special motion—quoted *Mootia v. Vieau* 1873 p. 33 of *Ston's Report*.

The execution debtor Abraham was however made a party to the cause ex-officio by the District Clerk, he appeared and was heard as a witness; it is true that he did not appear thro' counsel and took no attitude in the case. But can we deal with a judgment in which he is concerned when he has had no notice of the appeal and was not summoned to appear as a co-respondent. The decision in the case of *Mootia v. Vieau* does not govern this point. It merely rules that it is not necessary under pain of nullity of the whole proceedings, to make the execution debtor a party to every interpleader before the District Courts; and adds: "still it is the duty of the Magistrate to call him, on proper motion in any case, when he is satisfied that his presence is required;" here the execution debtor was made ex-officio a party in

The Court below and appeared. We think that he ought to have been made a respondent, and that in his absence we cannot deal with this appeal. But can we now order that he should be made a party to the appeal and be called before us? In presence of the terms of Art: 61 of Ord: 84 of 1852 and of the constant jurisprudence of this Court the appellant would not be within the delays prescribed by law to give notice of appeal now to Abraham. (See Target v. Lavaud 1863 p. 48. Ireland Fraser v. Issop Mamode, 1870 p. 134. Mollières v. Sicard, 1876 p. 10.)

We must therefore dismiss this appeal with costs.

### SUPREME COURT.

APPEAL TO PRIVY COUNCIL—REFUSED AS  
THOUGH THE TOTAL SUM AT ISSUE WAS  
RS 50,000, THE AMOUNT CLAIMED BY EACH  
APPELLANT WAS LESS THAN £1000.

*In this matter the Appellant desired to appeal to the Privy Council from a decision of the Supreme Court which had decreed that certain parties were entitled to a legacy of Rs 50,000.*

*The Court held that the appeal to the Privy Council was incompetent, as the individual interest of each Appellant in the sum of Rs 50,000 was less than £1000.*

GUILLARD & ORS,—Appellants

versus

CURATOR OF VACANT ESTATES  
& ORS,—Defendants.

Before

His Honor E. J. LECÉZIO,—Chief Judge,

and

His Honor A. MURK,—Puisne Judge.

P. LÉONCE CHASTELLIER,—Counsel for  
Appellants  
ADRIEN LHOSTE,—Attorney for the same.

LOUIS ROUILLARD,  
HON. WILLIAM NEWTON, } Counsels for Res-  
VICTOR DELAFAYE, } pondents.  
E. GILLET,

E. DUVIVIER,  
F. ROBERT,  
A. DE COMARMOND,  
H. LECÉZIO,  
H. BERTIN,  
E. LEBLANC,  
E. CHAILLET, } Attorneys for the same

Record No. 21,644.

26th September 1894.

Appeal to Her Majesty in Her Privy Council.

This is a petition for leave to appeal to the Privy Council from a judgment of this Court of the 17th July last, delivered in the matter of the Curator of Vacant Estates plaintiff, and Guillard and others defendants, and Renoy and others intervening parties, by which it was decreed that the intervening parties were entitled to a legacy of Rs 50,000, made by the late widow Messen to the relatives of her deceased husband.

The petitioners are 1o. Jules Guillard ; 2o. Alice Guillard ; 3o. Marie Jeanne Charlotte Léila Guillard, the divorced wife of Jean Joseph Ange Augustin Corson ; 4o. Marc Christian Guillard, some of the heirs of widow Messen who appeared as defendants in the above matter.

This application was objected to by the intervening parties, on the ground that the interest of the petitioners individually, such as it was affected by the judgment, was not prejudiced to the extent of £1,000, which is the appealable amount prescribed by the order in Council of 1831. It was admitted that the interest of each of the petitioners individually in the matter at issue, was not sufficient to give them the right to appeal, but it was contended that several parties to a suit, according to the grammatical meaning of the order in Council which made use of the expressions party or parties, had the right to add together



the several amounts which might accrue to them in case the judgment sought to be appealed from were reversed, in order to form a joint interest of an appealable amount. The cases of *Macfarlane* and another *vs.* *Leclaire*, 15 Moore's Privy Council cases p. 181, and of *Philips* and others *v.* the Highland Railway Company (*The Ferret*) VIII Law Report appeal cases 1888, page 329, were quoted in support of that theory.

In *Macfarlane's* case the appellants appear to have had a joint interest in the goods which were the subject matter in dispute, and we can hardly call a joint interest that of parties who, having a distinct share in a sum of money wish to add their interests together in order to make up an amount giving a right of appeal. Besides in that case the value of the goods in dispute was £ 1,642.14.5d, so that the appealable amount in lower Canada being only £ 500, as there were only two appellants, if their share was the same, each had an interest higher than the appealable amount. But we do not find that *Macfarlane's* case decided the very point which we are now examining, and which could not possibly arise from the facts dealt with in it.

With regard to *The Ferrets* case the decision was as follows: By an Order in Council Sect. 15 passed in pursuance of 2 Will. 4 (c. 51), the Vice Admiralty Court has jurisdiction to entertain a suit brought by any number of seamen not exceeding six to recover their wages. The Merchant Shipping Act 1-54, Sect. 189 does not take away such right of suit so long as the total aggregate amount claimed by such seamen exceeds £ 50. When in a suit brought by 6 seamen in the Vice-Admiralty Court the Judge found that a total amount of £ 203.9.8 was due to them partly for wages and partly for wrongful dismissal, but that the amount due to each was less than £ 50; it was held that under the above rule and section the judge was wrong in dismissing the suit for want of jurisdiction, and that a decree for £ 203.9.8d. should be made.

There the Privy Council had to apply a special law, according to which the action of the six seamen was a common and joint action, but we have not to deal with such a special rule here, and we fail to see how defendants, who were sued each for their share as heirs of a testator can say that they have a joint interest in the matter at issue.

In the case of *Macfarlane vs. Leclair* above referred to, the Privy Council considered that

in determining the question of the value of the matter in dispute upon which the right of appeal depends, the correct course to adopt, is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal. Now the liability of each of the petitioners upon the judgment of this Court, being of an amount insufficient to entitle each of them to appeal, we think that their interests are perfectly distinct and that they cannot add together the individual interests belonging to each of them in order to bring the total to an amount of £ 1000.

We must therefore refuse the application of the petitioners with costs.

## SUPREME COURT

### CLAIM OF AN ARM OF THE SEA HELD ON LMS FROM GOVERNMENT. INTERPRETATION OF A PRIVATE AGREEMENT BETWEEN PARTIES

*The plaintiff seeks a decree ordering the Defendant to give up an arm of the sea known as "Bassin Humbert", leased by the Government to the plaintiff—she also claims damages*

*The plaintiff leased "Bassin Humbert" from Government in 1863 for a term of 14 years.*

*In 1873 Mr. A. Bigaignon, acting on behalf of the Plaintiff, sub-let the "Bassin Humbert" to the Defendant for four years—and in 1876 Mr. Bigaignon promised and bound himself to Defendant to make application to the Government for the renewal of the lease, and to transfer to the Defendant all the advantages resulting from the stipulated application for all the time that the concession will endure.*

*The lease to the Plaintiff expired on 1st May 1877, and it was renewed for seven years. It again expired in 1884, and was renewed for five years.*

*The Defendant contends that by the terms of his agreement made with Mr. Bigaignon in 1876, he has a right to sub-lease the "Bassin Humbert" as long as the Plaintiff had a lease of the subject from Government.*

*the Court held that the agreement in question bound the Plaintiff to the Defendant for only one renewal of the lease.*

*The case is ordered to the Roll to be proceeded with—costs reserved.*

—  
WIDOW HUMBERT,—Plaintiff

*versus*

LAGESSE,—Defendant

—

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor ANDREW MURE,—Puisne Judge

—

J. JOLLIVET,—Counsel for Plaintiff

J. DE ST. PERNE,—Attorney for the same

Ion. W. NEWTON AND V. DELAFAYE,—  
Counsel for Defendant

E. LEBLANC,—Attorney for the same.

—

Record No. 22434.

26th September 1884:

In this action the plaintiff craves the Court for a decree ordering the defendant to quit and abandon forthwith the arm of the sea known under the name of "Bassin Humbert", which is let by the Colonial Government to the plaintiff, and by the latter sub-let to the defendant, secondly to pay to the plaintiff the sum of sixty Rupees for one month's rent for the Bassin Humbert, and thirdly to pay to her the sum of two thousand Rupees as damages for the loss and prejudice suffered by her in consequence of the defendant continuing to occupy illegally the said Bassin, and appropriating to himself the profits derived therefrom.

At the hearing of the case, after the opening of Plaintiff's counsel, who then proposed to lead evidence in support of his declaration, the defendant per Delafaye and Newton objected to that course, and maintained that a question of law ought to be decided in favor

of the plaintiff, before she could be allowed to usher in evidence. It appears that in 1863 an agreement was entered into between the Colonial Government and the plaintiff, by which the former let the arm of the sea in question to the latter for a yearly rental of thirty six pounds, and that for fourteen years.

This lease ended on 1st May 1877. It was renewed for seven years at an increased rent of Rupees 450 per annum. This was done by executing an additional agreement on the original lease.

This came to an end on 1st May 1884, and was shortly before its termination renewed for five years from that date in the same way as the former. In 1873 during the currency of the first lease Mr Alfred Bigaignon, who was the plaintiff's mandatory, she being then absent from the Colony, and the defendant, entered into an agreement by which the latter obtained a sub-lease from the plaintiff for four years for a rent of thirty dollars per month, which came to an end on the 1st May 1877. In July 1876 before the plaintiff's first lease had terminated, Mr Bigaignon, still acting as the plaintiff's mandatory, and the defendant, made another agreement under which Mr Bigaignon promised and bound himself to make to the Government the necessary applications to obtain from it the prolongation of the lease of 10th April 1873 of said arm of sea, and he further bound himself to transfer to the benefit of Defendant all the advantages resulting from the stipulated application, for all the time that the concession made to plaintiff will endure. It is on this document, and on the latter part of it, that the contention between the parties was based; the Defendant maintaining that it gave him a right to a sub-lease as long as the plaintiff had a lease of the subject from the government, while the plaintiff maintained that the obligation referred merely to the prolongation of the lease, which was then to be applied for, and the benefit of which was to be communicated to the defendant when obtained. The Court has carefully considered the document in question, being anxious in the defendant's circumstances that every argument urged on his behalf should be well weighed. Does then the word *concession* imply that as long as the plaintiff had a grant from the government of the Bassin Humbert, so long was he obliged to execute a sub-lease in defendant's favor? It is true that the word *concession* is used, but that word must be interpreted with reference to the context of the agreement. As the plaintiff

herself was absent, and as her mandatory was desirous of obtaining a renewal of the lease in her favor, the parties agreed that Bigaignon should take steps *afin d'obtenir la prolongation du bail*, and for that purpose he was to make *démarches* towards the government, but in the clause founded upon by the defendant the word "*concession*" follows immediately those of the "*démarches stipulées comme il est dit ci-dessus*." The conclusion is inevitable that the word *concession* in the intention of the parties, was limited to the prolongation of the lease which was to be obtained by the stipulated application. This view is confirmed by a subsequent clause of the document under which the defendant takes upon himself all the responsibilities connected with the Bassin, the plaintiff remaining only burdened with payment to the Government of the rent of the lease which was to be renewed to her, and he binds himself to pay a monthly rent of thirty dollars, payable regularly every four months "*et ce pour toute la durée du bail fait par le Gouvernement au profit de Madame Humbert*" These references in the same document which mentions the concession, to the rent of a lease which may be renewed to her, and to the duration of the lease in her favor, seem to point to this that the word *concession* is nothing but another word used to indicate the same idea as is given by the various terms "*prolongation du bail, loyer du bail, et durée du bail*." This interpretation derived from the document itself, seems more probable than an indefinite continuance of the lease over several renewals thereof. It is not likely that the plaintiff would bind herself for all her possible life towards the defendant; for his contention also implies that the rent payable by him should always continue to be sixty rupees per month, while the plaintiff's rent had been raised by the government and if circumstances changed after the seven years, and the arm of the sea became much more prolific, it is clear that the rent due by the principal lessee might be raised as high as the rent payable by the sub-lessee. We are of opinion that the document in question bound the plaintiff to transfer to the defendant all the advantages arising from one renewal of the lease only, and as that has been given to him, he is not entitled to found upon the document as entitling him to a second renewal of his sub-lease; with this finding in regard to the interpretation of the document, we order the case again to the roll for further procedure, cost meantime reserved.

## SUPREME COURT.

CLAIM TO FURNITURE &c. SEIZED IN EXECUTION OF JUDGMENT OF SUPREME COURT.—  
SALE SAID FURNITURE SET ASIDE.

*The plaintiff asks the Court to decree that certain articles and furniture seized by the defendant upon her husband, belong to her. She alleges that they were sold to her on the 9th May 1884.*

*On 24th April 1884 the defendants obtained judgment from the Court against Dr Cordouan, and very soon afterwards motion was made on his behalf to obtain from the Court a stay of execution, but it was only on the 20th May, after deliberation that the Court refused to stay execution. It was during that interval that the sale was made to the plaintiff.*

*The Court declined to give effect to the sale and dismissed the action with costs.*

CORDOUAN the wife,—Plaintiff

versus

SCHNEIDER & wife & anors,—Defendants

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor F. C. WILLIAMS,—Puisne Judge.

YVES JOLLIVET,—Counsel for plaintiff  
H. THATCHER,—Attorney for the same.

L. ROUILLARD,—Counsel for Defendants  
G. KÖENIG,—Attorney for the same.

Record No. 22,481.

26th September 1884.

This is an action by which the plaintiff asks the Court to decree that she is the lawful owner of certain articles and furniture which

have been seized by the defendants upon her husband. It appears that the defendants having obtained a judgment of this Court against the plaintiff's husband on the 24th of April last, sent an usher to seize furniture and other articles in their debtor's possession on the 23rd of May; the plaintiff then declared to the usher that all the furniture which was in her husband's house, and the horses and carriages which were in the stables in the yard, were her property, having been sold to her on the 9th of May, in order to repay to her certain sums of money belonging to her personally and which her husband had spent for his own purposes. The usher then withdrew but he came back on the 9th of June and effected the seizure notwithstanding the plaintiff's opposition. Whereupon this action was entered by the plaintiff, several documents were produced and witnesses were heard. The plaintiff and her husband, married in March 1880, under the system of separation of property and according to the marriage settlement, the plaintiff had at the time of the marriage no property save her wearing apparel and jewels of which no description was made. In December of the same year the plaintiff purchased a small property at Flacq, for the sum of Rs 900 which was paid according to the plaintiff's own evidence with monies which were given to her by her husband, who used to hand over to her as pin money all his revenue derived from his private practice as a medical man, and which amounted monthly to a sum of about Rs. 200. That property was insured in January 1881 for Rs. 4,000 by the "Lion Fire Insurance Company," it was burnt down in the beginning of 1882, and the Company then gave a cheque of Rs 4,000 to the plaintiff, who endorsed it to the order of Mr. St. Félix, her brother in law, and, who, she says, managed her business as well as that of her husband. St. Félix paid the cheque at one of the Banks to the credit of the account of the plaintiff's husband who since that time up to the date of the sale of his furniture to his wife on the 9th May last for Rs 2,530, had not re-invested the money for his wife's benefit. The plaintiff now asks the Court to declare that the sale or dation in payment made to her on the 9th May was a valid *remploi* made by her husband of part of the Rs 4,000 amount of the cheque given to her by the Lion Fire Insurance Company in 1882.

Under art. 1595 of the Code Civil § 2 a husband may make a transfer (*cession*) of part of his property to his wife, when such transfer has a legitimate cause, such as the reinvestment (*remploi*) of her real property

that has been sold, or of monies belonging to her if that real property or those monies do not fall into the community. For the plaintiff it was argued that the cession or sale of the 9th May was perfectly legal, that there was no fraud on her part in obtaining payment of part of her Rs 4,000 by means of that sale, and that she was merely exercising a right.

The defendants who had at first pleaded that the purchase made in December 1880 by the plaintiff in her own name, was simulated, and that she then acted as the *prête nom* of her husband, gave up that first plea but insisted upon the other plea, that the sale of the 9th of May by Dr Cordouan to his wife was in fraud of their rights as creditors of the plaintiff's husband, on account of the circumstances which preceded, accompanied and followed it. The attention of the Court was called to the very large sum alleged to have been given as pin money to the plaintiff by her husband, more than one sixth of his total revenue, to the unsatisfactory way in which the cheque of the Rs 4,000 was dealt with, first endorsed by the plaintiff to the order of St Félix, then paid by the latter to the credit of the plaintiff's husband—to the date at which the sale of the furniture was made, and lastly to the fact that the plaintiff's husband continued to use not only the furniture and the medical books sold by him to his wife, but also the horses and carriages equally sold and which all remained in the house, yard and stables belonging to him.

We have examined carefully the different facts of this case, and we are of opinion that the plaintiff has not shown to our satisfaction that the sale made to her on the 9th May last was a *bonâ fide* transaction under article 1595 of the Code Civil. Leaving aside the suspicious character of the very large gifts alleged to have been made to the plaintiff by her husband, and of the deposit of the cheque of Rs 4,000 to the credit of Dr. Cordouan's account, those facts, altho' they took place at a time when the defendants' claim existed, being antecedent to the proceedings entered against Dr. Cordouan and to the judgment taken against him by the defendants, we will merely consider the respective position of parties after the judgment obtained by the defendants against the plaintiff's husband. That judgment was delivered on the 24th April last. very soon afterwards a motion was made at the request of Dr. Cordouan to obtain from the Court a stay of execution, and it was only on the twentieth May that the Court after deliberation refused to stay execution.

It was during that interval, namely on the 9th May that the sale to the plaintiff was made by her husband, and they both admit that they then knew that the notice of motion for stay of execution had been served on the defendants. The only reasonable conclusion which can be drawn from those facts is that the plaintiff and her husband acted in concert, in order to prevent the defendants from seizing the furniture and other articles belonging to their debtor Dr. Cordouan. According to the plaintiff her husband had received monies belonging to her since the beginning of 1882, and she waited until the moment when a judgment creditor of her husband was on the point of seizing his furniture, in order to obtain a re-investment of her monies by way of sale. We think it was too late for her to do so to the prejudice of the other creditors of her husband, and it would be admitting in her favor a privilege which would be refused to any other creditor if we were to sanction the sale made to her under the circumstances revealed to us. We cannot do better in order to explain the grounds of our ruling than to quote part of the note under a decision given in a case very similar to the present one and reported in Dalloz 1849, 1-127.

"En outre, et ceci était beaucoup plus caractéristique de la fraude lors des actes attaqués, de nombreuses poursuites étaient exercées contre le débiteur et ces poursuites engagées dans le but de rendre exécutoire les titres des créanciers et de procurer à ceux-ci des hypothèques judiciaires avaient ainsi produit sur les biens du débiteur pour suivi une sorte de *mainmise* qui mettait obstacle à ce que le gage commun pût servir à désintéresser l'un des créanciers au préjudice des autres. Enfin c'était dans le court délai résultant d'une remise de cause, sollicitée par lui que le débiteur avait passé les actes critiqués dans le but évident de soustraire une partie de son patrimoine aux effets du jugement qui allait être prononcé. En présence de cet ensemble de circonstances il ne paraît pas douteux que le débiteur ne s'était pas borné à l'exercice légitime de droits que l'insolvabilité elle-même n'aurait pu lui enlever, et que tous les éléments de la fraude prévue par l'Art. 1167 se rencontraient et justifiaient l'action révocatoire des créanciers lésés."

In this case the plaintiff's position is still weaker for it was not before judgment, but after it had been pronounced and pending the proceedings for a stay of execution, facts well known to her, that she caused her husband to

sell to her the furniture which would otherwise have been seized and sold, in order that the price thereof be equally distributed among all her husband's creditors. We cannot, for the reasons above stated, give effect to such sale, and we must accordingly dismiss this action with costs.

## SUPREME COURT

ATTACHMENT OF MONIES DUE TO POOR LAW GUARDIAN POOR LAW MEDICAL OFFICER AND MEDICAL VACCINATOR, AND MEDICAL ATTENDANT ON SUGAR ESTATE—TRANSFER TO A THIRD PARTY OF FEES DUE AS MEDICAL ATTENDANT.

*This case was referred to the Court by the Judge in Chambers.*

*The Plaintiffs attached in the hands of the Receiver General and Chief Medical Officer all sums of money which they have to pay to Defendant, and especially the fees accruing to him as Medical Attendant on Sugar Estates and also as Poor Law Medical Officer, Poor Law Guardian and a Government Vaccinator, in order to secure the payment of Rs 3357.90 amount of a Bill of costs due to them by Defendant.*

*In Chambers the Defendant objected to the Validity of the attachment on the ground that by Ordinance 42 of 1881, the salary of a Poor Law Medical Officer & Poor Law Guardian cannot be attached.*

*On the case being heard the Plaintiffs' Counsel gave up the attachment as far as it referred to monies accruing to Defendant as Poor Law Guardian, Poor Law Medical Officer and Government Vaccinator, but he maintained it as Medical Attendant on Sugar Estates. It was urged that the latter was equivalent to a salary, but this was over-ruled by the Court.*

*Mr. L'Hoste intervened as holder of a transfer of all the fees Dr. Cordouan had to receive as Medical Attendant on Estates during the remainder of the year. The Plaintiffs contended that they were entitled to share with Mr. L'Hoste.*

*The Court held that Mr. L'Hoste alone had the right to the fees due or to become due to Dr. Cordouan until the end of the year.*

*The Court declined to give effect to the Plaintiffs' contention.*

*diff's attachment with regard to fees that may accrue to Dr Cordouan as Medical Attendant next year, as there is as yet no contract with him.*

[ JARDIN AND ANOTHER,—Plaintiffs

*versus*

CORDOUAN,—Defendant

A. LHOSTE,—Intervening party

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—  
Puisne Judge

L. ROUILLARD,—Counsel for Plaintiff  
F. ROBERT,—Attorney for the same

Y. JOLLIVET,—Counsel for Defendant  
H. THATCHER,—Attorney for the same

P. L. CHASTELLIER,—Counsel for the Intervening party  
A. LHOSTE,—Attorney for himself

Record No. 22555.

26th September 1884.

The plaintiffs have attached in the hands of the Receiver General and of the Chief Medical Officer all sums of money which they may have to pay to the defendant, who is a Doctor of Medicine, and especially the fees accruing to him as medical attendant on sugar Estates, and also as Poor Law Medical Officer, as Poor Law Guardian and as Government Vaccinator, in order to secure to the Plaintiffs the payment of the sum of Rs 3357.90 amount of a Bill of costs due to them by the defendant.

In chambers the defendant objected to the validity of the attachment on the ground that

by Ordinance 42 of 1881 the salary of a Poor Law Medical Officer and Poor Law Guardian cannot be attached, and that at all events the attachment ought to be reduced to a certain amount.

The case was referred to Court, and when parties were heard the plaintiffs' counsel declared that he gave up the attachment in so far as it concerned the monies accruing to the defendant as Poor Law Guardian, Poor Law Medical Officer and Government Vaccinator, but that he maintained it with regard to the fees as medical attendant on Sugar Estates.

The defendant's counsel then argued that those fees were equivalent to a salary paid to the defendant by Government, and that according to the provisions of Ord. 32 of 1881, they could not be attached, but the Court overruled that objection and declared that such fees might be attached by the creditors of a medical attendant on Estates.

The defendant's counsel also asked that the attachment be reduced to a certain proportion, and that the defendant should be allowed to retain the remainder of the fees for his personal expenses. But it was not shown to us that his other resources were insufficient and as this is not a case of attachment of the sole means of living of a party, we are not disposed to interfere and reduce the amount attached.

Mr L'Hoste intervened in this case as holder of a transfer of all the fees which Dr Cordouan had to receive as medical attendant on Estates during the remainder of this year, this transfer was served on the Receiver General on the 9th May, and it is not challenged as having been made in fraud of the rights of the plaintiff, who simply argued that they were entitled, in virtue of their attachment, altho' it is posterior to the service of the transfer, to share with L'Hoste the fees that have fallen and are to fall due after the attachment was lodged. The principal argument of the plaintiffs was that the transfer gave a right of preference to the transferee only for the sums which were actually due at the time it was served, but that he had no right of preference upon the sums which become or will become due after the service of the transfer. In this case the fees are to become due in virtue of an existing contract made at the beginning of the year, and we are of opinion that in such circumstances the holder of a transfer duly served has a right of preference over the parties who have lodged their attachment after the service of the transfer, such service having vested the

transferee with the privileged right of claiming the sum to become due. See *Dalloz V. Vente n. 1698—1699*. We therefore hold that L'Hoste has alone the right to claim payment from the Receiver General of the fees due or to become due till the end of this year to Dr Cordouan.

With regard to the attachment of the plaintiff it has been given up so far as the defendant's salaries as Poor Law Guardian, Poor Law Medical Officer and Government Vaccinator are concerned, and we have decided that the defendant's fees as medical attendant on Sugar Estates for the remainder of this year are the property of L'Hoste, we do not think that we can give effect to it with regard to the fees that may accrue to the defendant as medical attendant on Estates next year, as there is yet no contract between him, and the owners of those Estates, and it cannot be said that the fees belong or will surely belong to him in virtue of an existing cause (Art. 557 C. Pr. Civ.) We must therefore dismiss the application for validity, but as the point we have just decided was not taken by the defendant either in Chambers or in Court, and the objections argued by him in Court were overruled, we do not think that he is entitled to costs,—but L'Hoste having intervened to protect his rights, which were different from those of the defendant, and having been successful, we consider that he is entitled to his costs against the plaintiffs.

We give the same decision in the case of *Schneider and wife versus Cordouan*.

### SUPREME COURT

*This is an appeal against a decision of the Master of the Supreme Court who set aside the proceedings taken for the sale of seven immoveable properties to the value of about Rs 23,000, to secure the payment of Rs 749, as he considered that the proceedings had been wrongly entered without any necessity or direct interest.*

*The Court upheld the Master's decision.*

JEAN LOUIS,—Appellant

versus

NADAL & ORS,—Respondents

Before

His Honor E. J. LECLÉTO,—Chief Judge

and

His Honor F. C. WILLIAMS,—Puisne Judge

L. ROUILLARD }  
 & } Counsels for Appellant.  
 Y. JOLLIVET }  
 H. THATCHER,—Attorney for the same.

V. KIVERN — Counsel for Respondent.  
 E. SAUZIER,—Attorney for the same.

Record No. 22,568

26th September 1884.

This is an appeal from a judgment of the Acting Master of this Court given on the 4th August last in the matter of an application made by Widow Nadal praying for the nullity of the sale by licitation of seven immoveable properties begun by the appellant, as a creditor exercising the rights of his debtor Widow Nadal against her and other parties. The proceedings were set aside by the Acting Master because he considered that they had been wrongly entered, without any necessity or direct interest.

After reading the record and the judgment of the learned Master, we think that he has made a sound application of the law under article 1166 of the Civil Code to the facts which he had before him. We entirely agree with him when he says that article 1166 never intended that a rush should be made on the estate of the debtor who is not an insolvent, and that it was not necessary or even useful to sue for the licitation of Rs 23,000 of immoveable properties, to ensure the payment of Rs 794; the Court will never countenance proceedings the clearest result of which is an accumulation of heavy costs without any apparent utility, when it is shown that a creditor, especially a creditor for such a small amount, might much more easily and with much less costs have ensured the payment of his claim.

We must accordingly dismiss this appeal with costs.

## SUPREME COURT

MANAGER OF ESTATE APPOINTED BY MANDATORIES REFUSES TO GIVE UP HIS MANAGEMENT WHEN DESIRED BY THE PRINCIPALS. THE COURT HELD THAT THE LATTER HAVING PARTED WITH THEIR RIGHTS OF APPOINTMENT CANNOT REMOVE THE MANAGER.

*The Plaintiffs are part-owners of Deep River and La Louise Estates. By a deed of partnership some of the owners constituted Messrs Elias, Mallac & Co. their mandatories, and others Mr Louis Victor Mazery, and power was conferred upon these gentlemen to represent their respective principals in all questions to be solved concerning the partnership.*

*Messrs Elias, Mallac & Co. and Louis Victor Mazery appointed Mr Léonidas Mazery to be manager of the Estates. The plaintiffs desire to revoke his appointment. Messrs Elias, Mallac consent but Mr Louis Victor Mazery objects.*

*Held that the plaintiffs not having reserved to themselves the power to appoint and revoke the appointment of a local manager, it was for Messrs Elias, Mallac & Co. and Louis Victor Mazery to consider whether Mr Léonidas Mazery's appointment should be revoked.*

*Declaration dismissed with costs.*

CAYROU & ORS.,—Plaintiffs

versus

MAZERY & ORS.,—Defendants

Before

His Honor A. MURE,—Puisne Judge

and

His Honor J. ROUILLARD,—Acting Puisne Judge

P. L. CHASTELLIER, } Counsel for Plaintiffs  
Hon. W. NEWTON, }  
A. J. COLIN, } Attorneys for the same  
H. BERTIN, }

G. GUIBERT, } Counsel for Defendants  
V. DELAFAYE, }  
E. LECLÉZIO, } Attorneys for the same  
H. LECLÉZIO, }  
G. KENIG, }

Record No. 22,515

27th September 1884

This is an action in which twelve plaintiffs all proprietors of the Estates "Deep River" and "La Louise" in the District of Flacq, ask a judgment from the Court ordering one Léonidas Mazery to give up the management of the said Estates with costs. The grounds upon which this conclusion is rested, are that the plaintiffs and defendants are co-owners of the two Estates of "Deep River" and "La Louise", the former to the extent of two thirds and the latter one third thereof and which are worked under a deed of partnership which is to exist for nine years from the 3. st May 1882 to the 31st May 1891; it is then averred that Léonidas Mazery who, it is admitted, is owner to a small extent of the said Estates, has been the previous manager thereof, that the plaintiffs have amicably requested him to give up the management of the Estates which he has refused to do; that the powers held by Mr Mazery may be recalled at will, that the plaintiffs have the right to demand that Mr Mazery should not continue, and that they, by notice served upon him on the 5th June last, formally revoked his powers. From these allegations the conclusion which has been already mentioned is drawn. The defendants, who are ten in number, most of them abide by the decision of the Court, one, Mrs Allard, on the merits, sides with the plaintiffs, and argues to the same effect as they do. It is necessary to notice the defences of Pierre Mazery and Léonidas Mazery. The former pleads that the joint management of the said Estates has, by the deed of partnership, been conferred upon Messrs Elias Mallac & Co. and upon Louis Victor Mazery, and, in default of the latter, upon himself Pierre Mazery, and that during the existence of the partnership, the plaintiffs cannot personally interfere in the management of the Estates, and that he himself has no reason to complain of their management.

The defendant Léonidas Mazery pleads



that, under the deed of partnership, the plaintiffs cannot exercise any individual rights of ownership especially in the management of the Estates, that he himself was appointed "administrateur" by Elias Mallac & Co. and Louis Victor Mazery, who jointly managed the affairs of the partnership under the deed, and that the power held by him can be revoked only by the joint action of Elias Mallac & Co. and Pierre Mazery, or at least by the unanimous consent of all the partners. It is to be observed that no evidence has been produced of the appointment of Léonidas Mazery, and that it does not appear whether he was appointed by a written document or verbally. All that the plaintiffs tell us is that he has been previously manager of the Estates, and all that he himself says is, that he was appointed "Administrateur" of the Sugar Estates by Elias Mallac & Co. and Louis Victor Mazery, he does not say when or how, and he has not produced any evidence of his appointment. The case was however argued on the footing that admittedly he was manager of the Estates. The deed of Partnership has been produced. It was executed at Port Louis, Mauritius, and as many of the proprietors were living in France, powers of attorney or deeds of procuration having been executed by these parties in favor of Elias Mallac & Co., and the deed is executed by a member of that firm as representing his Company on behalf of the absent *mandants*. It further narrates the partners, and the shares to which each was entitled and then that these estates had been worked under a former deed of partnership, and the desire of the parties to prorogate anew the said partnership for nine years under the same conditions as before. Two of these conditions are important in the present question. The third is to the following effect: "Mr. Louis Victor Mazery promet d'inspecter les propriétés faisant l'objet des présentes aussi souvent que ses affaires le lui permettront, et d'aider ses associés de ses conseils sans qu'il puisse résulter aucune responsabilité pour lui, les intéressés devant dans tous les cas être consultés dans l'administration générale des dites propriétés, les changements à opérer, et les innovations à introduire." The sixth article is to the following effect: "Messrs Elias, Mallac & Cie. représenteront leurs mandants pour toute question à résoudre concernant la Société. Dans le cas où MM. Elias, Mallac & Cie. cesseront d'être leurs mandataires, ils seront tenus de se faire collectivement représenter par une personne habitant la colonie et domiciliée à Port Louis, Mr. Louis Victor Mazery ou en

"cas d'empêchement du dit sieur Mazery, Mr. Pierre Mazery représentera tous les autres associés. Messrs Elias, Mallac & Cie., ou la personne qui serait nommée à leurs places par les mandants dans le cas de décès prévu, et Mr Louis Victor Mazery ou à son défaut Mr Pierre Mazery, auront conjointement la signature sociale comme représentants de la dite société qui nuera sous le nom de Mazery & Cie., et devront toujours s'entendre pour tout ce qui concernera la dite société. En cas de dissidence d'opinion ils s'en rapporteront à la décision d'un seul arbitre nommé par eux, lequel jugera définitivement." At the discussion of the case, a very learned argument was submitted to the Court on the legal question whether a mandate given by several partners could be revoked by one only, or required the assent of all to do so, on the one hand were quoted the authority of Duranton, Vol. 17, p. 477. Troplong, société Vol. II, No. 200, Pont, Société Civile & Commerciale No. 457 & 511 and also Petites Contrats, Art. 204, No. 1,158, Zachariée by Massé & Vegey, Vol. 4, page 438, Note 1. On the other hand were cited Cassarejis an old author as quoted by Troplong in his treatise on Mandat, article 71<sup>u</sup>, and Laurent Vol. 26, Article 84, and great weight was laid upon a report of a case of the Court of Cassation in 1810 which appears in Sirey Villeneuve for 1865, Part. 1 page 339 which is curiously reported as follows: "Un mandat donné par Adam & D'Ancosa associés n'a pas été valablement révoqué par Adam seul".

It is noteworthy that this judgment of the Court of Cassation contains no statement of the facts, and no reason upon which it is based, and it seems never to have attracted any attention as it preceded all the writings of the authors abovementioned, none of whom notice it. Without entering at length into a discussion of this legal point, we are of opinion for the reasons given by Troplong, and those on his side of the question, that a mandate is a delegation of the right of each proprietor to manage his share of the property, and that as the will of the mandant created the right of the mandatory, so his will may revoke that right, we cannot accept the reasoning of Laurent as satisfactory that the concurrence of all the partners was necessary to derogate from the partnership contract by the appointment of a mandatory, and that therefore all the partners must necessarily revoke, and that the division of a mandate is inconceivable. On the contrary it seems to us that certain partners may give a mandate to

long with other partners themselves, that as easy to imagine the power of administration acted upon by a mandatory, and a partner as by two partners, and that therefore the action of the mandate can quite easily be received. Mandates operate by a supposed instant renewal of the consent of the will which at first conferred the authority, and if

will be withdrawn it is difficult to see the right of the mandatory can continue. In this case depended upon the granting of a mandate by the plaintiffs themselves in favor of Mr. Léonidas Mazery, the Court would be disposed to hold that it had been revoked mainly in so far as the plaintiffs were concerned, and that he could no longer represent them. But the decision of this case depends more upon the terms and conditions of the articles of partnership than upon any question of law. It is clear that in every contract of partnership the terms of the deed of constitution are supreme and must govern every case which falls within these terms. The Court must carefully consider the object and purpose for which the partnership was formed and estimate the extent of the powers of administration which are necessary to effect the purpose of the partnership. In the present case we have a Sugar Estate of considerable extent, the proprietors of which are numerous and mostly resident in France, and who seem to have been well aware that the business of such an estate, the planting of canes, and the making & selling of sugar must be concentrated into the hands of one or more parties on the spot, a few thus holding the powers of all the rest. Accordingly one of the leading purposes of the deed is to nominate parties resident in Mauritius, who will attend to the necessary duties. By the sixth article Messrs. Elias, Mallac & Co. are selected by all their mandatories to represent them in all questions to be solved concerning the partnership, while all the other partners select Louis Victor Mazery, whom failing Pierre Mazery to represent them. In doing so what did the partners mean to bring about? If they were represented in Mauritius in the duties and responsibilities of the partnership, it is clear that Messrs Elias Mallac & Co. and Pierre Mazery take their places and come in their room. They are endowed with all the powers which the partners would have had if they had been on the spot. Therefore we must hold that in all ordinary acts of administration Messrs Elias Mallac & Co. and Pierre Mazery represented all the partners of the present concern. The appointment of a local manager for the Sugar Estate seems to have been an ordinary act of administration and to have

been absolutely necessary to carry on the business of the Estate. The act was undoubtedly within the powers of these mandatories and they were entitled so to act.

And it is not to be forgotten that one of them Pierre Mazery is a partner of this Estate, and as such comes within the very terms of article 1856, which makes his power irrevocable except for some grave fault, and to continue as long as the partnership itself. It is true that the other mandatories are third parties but even in that case it is a grave fact that they derive their power from the very deed that constitutes the partnership. Without entering on the difference of position between these parties, it is enough for us that one of them holds an irrevocable power, and that this power has been exercised in the appointment, in which he has united, of a local manager of these Estates. The deeds goes on describing the powers of the mandatories to say that they shall conjointly have "la signature sociale" and then follow the important words that they must always agree or act in concert in every thing which will concern the said Partnership, we conclude then that to make any act valid there must be united concert and agreement of these mandatories. The deed moreover has foreseen the possibility of a difference of opinion and concludes with a clause of arbitration. But in default of a definite appointment of an arbiter this clause is inoperative. Now in this matter of revocation of Mr. Léonidas Mazery's managerial powers, while Elias Mallac & Co. agree with the plaintiffs, and wish to see judgment given as they desire, Pierre Mazery on the other hand objects. There being thus a difference of opinion between the two mandatories of the partners appointed by the deed, the grave question for consideration remains: have the plaintiffs the right to override this difference of opinion, and to prevail in the present contention. It is true by the third article of the deed the partners are in all cases to be consulted in the general management of the properties, and in the changes to be effected and innovations to be introduced. There is here reserved to them a consultative power; they were no doubt consulted and they assented to the appointment of the local manager, and if changes are made or innovations such as new machinery introduced, they ought also to be consulted. But they do not reserve to themselves power to appoint and to revoke the appointment of the local manager, and it is perfectly clear that this is not an act which would be wisely reserved to parties living in

France and in various towns there. They have entrusted this to those who represent them, and as these representatives have exercised their power it is for them to consider whether that power should be revoked, and a different manager appointed. Troplong in commenting upon article 1859 seems to have considered this very point. He says in his treatise *contrat de société* Vol: 2 art. 740 "Les droits que l'article 1859 accorde aux associés sur les choses de la société n'ont-ils lieu qu'autant que la société n'est pas pourvue d'un administrateur élu? Si l'administration avait été déléguée les associés autres que l'administrateur ne pouvaient-ils s'ingérer dans l'administration, ..... s'ingérer dans l'administration, quand il y a un administrateur vigilant, est un acte téméraire et répréhensible." D'allox also *Verbo Société* art: 60 says to the same effect "Lorsque les associés ont nommé un ou plusieurs gérants ceux qui n'ont pas été désignés, n'ont pas le droit de s'ingérer dans l'administration, du moins en thèse général." It follows that the plaintiffs having parted with their right of ordinary management, and having called into existence two managers who represent them, and who must agree in their resolutions, cannot interfere with their acts; and we cannot affirm the view taken by the plaintiffs in the replication to the plea of Léonidas Mazery that they are not prohibited by the deed from taking the course now followed.

It is true that one of the mandatories agrees with them, but the other does not, and that is just the case in which the maxim applies "*in pari causâ melior est conditio prohibentis*". It may not be a satisfactory state of things, if the two persons in whose hands have been concentrated all the powers of the numerous owners of the estate, cannot agree on the question whether a particular manager is to be maintained. But if the parties cannot agree, the law has provided remedies and it is for the parties to consider what steps must be taken.

We must dismiss this declaration with costs.

### SUPREME COURT

APPEAL.—CONTESTATION AS TO THE INTERPRETATION OF A WRITTEN AGREEMENT WITH CREDITORS.

*This case comes before the Supreme Court on appeal from the District Court of Port Louis.*

*The appellant was a creditor of the firm Marimootoo & Co. who made a composition with their creditors, which composition was to be paid by one Ayassamy. As the latter however failed to pay the composition, the stock in trade of Marimootoo & Co. was purchased by the respondent for a sum of Rs 15,000 who according to his own statement, was to pay the creditors named to him by Marimootoo 25 o/o of their claims, but his responsibility was limited to Rs 15,000. He declared that he had distributed the Rs 15,000 to the creditors named.*

*The appellant was not among those paid and he contended that he was entitled to be included.*

*The Magistrate found for the respondent.*

*The Court held that as the evidence of Marimootoo was to the effect that the appellant was one of the creditors to be paid from the Rs 15,000, the Magistrate's judgment should be reversed.*

*Judgment for appellant with costs.*

A. VELOOCHETTY,—Appellant

versus

CASSIM MAMODE LANGBEE,—Respondent

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—Puisne Judge

A. BOUCHERAT,—Counsel for Appellant  
H. BERTIN,—Attorney for the same

L. ROUILLARD,—Counsel for Respondent  
W. EDWARDS,—Attorney for the same

Record No. 822.

6th November 1884.

*This is an appeal from the decision of a Magistrate who found for the Respondent.*

*The appellant, along with other creditors of Marimootoo & Co., had agreed in writing*

to accept a composition to be paid on Marimootoo's behalf by one Ayassamy and some three months later, Ayassamy not having paid the composition, the respondent purchased Marimootoo's stock in trade for Rs. 15,000 (rupees) which sum, according to the memorandum of purchase, he agreed to pay to certain creditors of the firm in the proportion of 25 o/o on their claims, and according to the terms of their former agreement with Ayassamy. The question for the Magistrate in the Court below and for us upon appeal is as to the construction to be placed on this written undertaking. The defendant upon his personal answers, afterwards repeated upon oath, declared his interpretation of his undertaking to be that he was to pay only certain of the creditors to be named to him by Marimootoo, and that plaintiff was not among these, and moreover, that his responsibility to them was limited to the purchase price of the business, the Rs. 15,000 already referred to. He swore that he had paid these creditors and that he had exhausted this stipulated sum, but he produced no documentary evidence in support of this assertion; and we cannot but think it a strange feature of the case that a certain "document B." to which he referred as containing a list of the other creditors whom he had paid, was not put in evidence. The Magistrate, however, considered that the defendant's evidence was generally corroborated by the only witness called for the plaintiff, Marimootoo, but we find as a matter of fact that Marimootoo differed from the plaintiff on two important points, for he declared that Langree's agreement with him was to pay *all* the creditors who had subscribed the agreement A with Ayassamy, among them being the plaintiff and appellant, and moreover that he had never denied to Langree the validity of Velochetty's claim against the Estate.

We find, as a matter of construction of the respondent Langree's written undertaking, that he was to pay the creditors who signed document A, and among them the appellant, who may therefore have a right to sue.

We find, moreover, that his liability was limited to the sum of 15,000 rupees, which was the estimated price of Marimootoo's business, and we consider that he was liable to the plaintiff unless he could show clearly an *onus* which rested upon himself, that this amount had been wholly appropriated to Velochetty's fellow signatories. The evidence upon this point in the Court below was not, we think, sufficient to justify a verdict for the

defendant, who seems to have paid all the signatories to document A save the plaintiff alone, and to have received a far larger sum than the estimated Rs. 15,000 as the result of his sale of the stock. The decision of the Magistrate in favour of defendant will be consequently set aside, and a verdict entered for the plaintiff with costs.

## SUPREME COURT

FAILURE TO NOTIFY AN ATTACHMENT WITHIN EIGHT DAYS TO A DEBTOR IS A CAUSE OF NULLITY.

*In this matter the Court held that an attachment was null which had not been notified within eight days to the debtor, altho' the debtor had been summoned to shew cause why the attachment should not be validated.*

BONHOMME,—Plaintiff

versus

NINA,—Defendant

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—  
Puisne Judge

P. L. CHASTELLIER,—Counsel for Plaintiff  
V. DUCASSE,—Attorney for the same

A. HUGUES,—Counsel for Defendant  
T. NICOLAS,—Attorney for the same

Record No. 22,661

6th November 1884

In this case Alcida Bonhomme *alias* Charlotte being creditor for a sum of Rs 118.82 of one Auguste Nina, under a decree of a Judge of this Court, lodged an attachment in the hands of four different garnishees on the 29th and 30th August 1884; on the 2nd September following Bonhomme applied for and obtained a summons to validate the said attachment. The summons called upon the defendant Nina to attend a Judge in Chambers on the 9th September to shew cause why an attachment of monies due to the said

defendant by the four garnishees and lodged with the latter on the 29th and 30th August should not be held good and valid. This summons was served on the debtor Nina on Saturday the sixth September following, but the summons was the sole writ so served, and Bonhomme omitted within the period of eight days to notify the act of attachment to the debtor Nina, either by serving a copy thereof in full along with the summons, or serving any notice containing a statement of the title of the sum due and of the domicile of the seizing creditor.

By the code of civil procedure, the regulations of which in matters of "saisie-arrêt," or attachment, are followed by the Practitioners of this Island, every creditor may attach in the hands of a third party any sum or effects belonging to his debtor in virtue of authentic or private titles or the order of a Judge. The writ of attachment by article 559 is directed to contain a statement of the title and of the sum for which it is made. By article 563 within eight days of the "saisie arrêt" the attaching creditor is bound to notify the attachment or opposition to the debtor, and to cite him for the validity of it, and by article 565 in default of the demand in validity, the attachment or opposition is declared to be null. Here it was objected by the debtor that the writ of attachment not having been notified to him within eight days the demand in validity was null. To this it was answered that the writ of summons was sufficient to notify to the debtor that an attachment had been lodged. It is true that the nullity in express terms is limited to the demand in validity. But by the 563rd clause there is an express direction within a fixed delay to notify the attachment to the debtor, and that is coupled at the same time with the duty of citing the debtor to see the attachment validated. The two things are so united that the Courts and the Commentators of France universally lay it down that the notification of the attachment to the debtor is an essential part of the procedure, and its omission involves the nullity thereof. "Dalloz" saisie arrêt Nos 288 & 253. Chauveau & Carré article 1945 Saisie and 1946. Boitard Vol. 2 art. 822 and Bioche saisie-arrêt art. 119 are all clear that the notification to the debtor and the summons for the validity of the attachment shall be both made, else the demand for the validity is null. To these authorities must be added an express decision of the Court of Cassation reported in Dalloz Periodique 1878 1. 64 which affirmed a decision of the Court of Paris reported in D. P. 1871. 2. 100. The

Judgment of the Court of Cassation contains the two following reasons. "Attendu qu'il n'y a aucune espèce de saisie arrêt ou opposition qui n'ait été affranchie par la loi de la formalité de la dénonciation au débiteur saisi avec notification en validité prescrite à peine de nullité par les articles 563 et 565 C.P. civile, que dès lors même faite entre les mains d'un débiteur de deniers publics, la "saisie arrêt" ou opposition reste soumise à la formalité de la dénonciation au débiteur saisi laquelle doit à peine de nullité être faite dans le délai de huitaine fixé par l'article 563 C. P. C."—

With the law thus laid down we agree. In the first place this is a case in which execution or diligence is used to recover a debt due by the debtor, and in all Courts of law, procedure of that nature ought to be considered "*strictissimi juris*". The agent who executes diligence is bound carefully to attend to every direction which the law imposes. While we do not think that a literal copy of the attachment must be served upon the debtor, we are of opinion as the 559th section requires the attachment to set forth the title in virtue of which it is made, and also the sum of the debt to secure payment of which the procedure is taken, that these two matters must at least be clearly and explicitly notified to the debtor. In the next place the notification and the summons for validity are so united that we agree with the Commentators in holding that the formality of notification is an essential either together or separately with the summons of validity to which the 565th section attaches the pain of nullity. For these reasons we find the attachment in this case null with costs.

## SUPREME COURT.

REDDITION OF ACCOUNTS. — ARBITRATION AGREED UPON IN A DEED COMMENCED BUT NOT COMPLETED WITHIN THREE MONTHS, DECLARED TO BE NULL BY THE COURT.—ARTICLES 1003 ET SEQQ. OF THE CODE OF CIVIL PROCEDURE.

*The plaintiff asks for a Reddition of accounts from both defendants, and in default Rs 100,000 damages with costs and caption of the body. The defendants replied that by a deed of 24th June 1875 it was agreed between the Plaintiff and themselves that any contestation, such as the present, should be submitted*

*to arbitration—that in the present contestation arbitrators had been appointed, but that the Plaintiff had refused to supply even his own arbitrator with the information and documents he required; that Plaintiff left the Island in 1876 (So.) That they rely on the arbitration, and pray for a judgment of the Court referring the action to the arbitrators.*

*to this the Plaintiff replied that the deed of arbitration is now of no effect, because it was not followed up within three months as required by article 1007 of the Code of Civil Procedure; and secondly because the parties not having taken any legal steps for the execution of the conventions contained in the deed of arbitration as provided in article 1009 of the C. of C. P., have tacitly abandoned the arbitration.*

*The Court held that the arbitration was not binding upon the Plaintiff and refused to refer the case to the arbitrators appointed under the deed heretofore mentioned.*

CRECY DE LANUX—Plaintiff,

versus

F. BOYER DE LA GIRODAY—Defendant.

and

CRECY DE LANUX—Plaintiff,

versus

P. BOYER DE LA GIRODAY—Defendant.

Before

HIS HONOR ANDREW MURK, —Puisne Judge

and

HIS HONOR F. C. WILLIAMS, —Puisne Judge

L. ROVILLARD, —Counsel for Crécy de Lanux  
V. G. DUCRAY, —Attorney for the same.

E. GALLET, —Counsel for Pierre Boyer de La Giroday.  
G. KÖNIG, —Attorney for the same

Hon. W. NEWTON, — Counsel for Frédéric Boyer de La Giroday  
G. KÖNIG, —Attorney for the same.

Records No. 22564 & 22565.

25th November 1884.

In these actions the plaintiff asks for a reddition of accounts against both defendants, and in default of their complying with the order of the Court, for a decree condemning them to pay as damages to the plaintiff a sum of Rs 100,000 with costs and caption of the body. To this action the defendants inter alia have pleaded, that the actions were incompetent inasmuch as by a deed dated 24th June 1875, executed, among others, by the plaintiff and both defendants, it was agreed that the subject matter of the present suits, and all contestations existing between the parties relative to the affairs of *Walhalla, Magenta* and *Tamarind* Estates should be referred to two arbitrators, one to be appointed by the plaintiff and the other by the defendants, and accordingly Messrs. Joseph de Mazérieux and the Honorable L. L. Raoul were appointed arbitrators,—that they accepted the office, and that the defendants handed over at once to their arbitrator Mr. L. Raoul all the documents and papers connected with the subject matter of this suit, which said documents and papers remain to this day in his office. That the plaintiff repeatedly refused to give, even to his own arbitrator, Mr de Mazérieux, any information relative to the matters referred to arbitration, although requested to do so. That the plaintiff suddenly left the Island in the year 1876, and that on 8th March 1877 the Curator of Vacant Estates was sent into possession of the plaintiff's rights in Mauritius, and remained so for a period of about 8 years. This plea finally alleges that the plaintiff has, by his own fact, and through his own fault, prevented up to this day the two arbitrators from coming to a decision in the matter submitted to them, and this to the defendant's loss and damage. For their third plea the defendants have pleaded that they rely on the deed of arbitration which is binding upon the plaintiff and all parties concerned, and pray for a judgment from the Court referring the action to the arbitrators who will decide finally all the issues raised in the suits; and ordering the plaintiff to supply his arbitrator with all necessary information and documents. To this plea the plaintiff has made a replication to the effect that the deed of arbitration

is now of no effect or value (first) because the reference to arbitrators was not followed up and carried out within three months of its signature as required by article 1007 of the Code of Civil procedure, and the arbitrators appointed are now "*functi officio*" and (second) because the plaintiff and defendants, not having taken any legal steps for the execution of the conventions contained in the deed of arbitration, as provided in article 1009 C. C. P., have tacitly abandoned the idea of a judgment of arbitrators, and the defendants have now no right to invoke the said agreement.

To this the defendants have answered denying the legal position of the plaintiff who, they say is not entitled to invoke the prescription of article 1007 C. C. P., and alleging that the deed of arbitration is still valid.

A notice of facts has been given by the defendants containing in detail the allegations made by them in their third and fourth pleas, and they proposed, by motion before a Judge in Chambers, that *subpœnas* should issue to enable them by parole evidence to prove facts referred to.

This being objected to by the plaintiff, the judge referred the question to the Court. At the hearing, not merely the motion to lead evidence was discussed, but the whole legal effects of the defendant's third and fourth pleas. The deed of arbitration which has been produced contains the following clauses. "Les parties s'obligent à la première requisition des arbitres de leur produire tous les titres, papiers, documents et renseignements se rattachant à ces affaires. Les arbitres sans être astreints à aucune formalité légale auront le droit d'interroger chacune des parties séparément comme aussi tous autres témoins qui seraient désignés par les parties."

The law of arbitration is contained in the third title of the code of civil procedure beginning with article 1003 and ending with article 1023 inclusively. It is there provided that the submission shall be reduced to writing either formally or informally. By article 1007 it is enacted that the arbitration will be valid although no fixed time for its duration is specified, and in that case the mission of the arbiters shall endure only three months from the day of the arbitration. By article 1009 the parties and the arbiters are bound to follow in the procedure the delays and forms established by the Courts of Law, if the parties have not otherwise agreed. By article

1012 the submission terminates by the expiry of the stipulated delay, or by that of three months if it has not been fixed in the deed. By article 1016 each of the parties is bound to produce his defence and documents at least fifteen days before the expiry of the delay of the submission, and the arbiters are bound to give a decision upon what may have been produced to them.

Having considered carefully the effect of these clauses with the commentaries thereon of the best writers on the Code of Civil Procedure, we have now formed an opinion upon the legal effect of the clauses as applied to the facts of these cases. It is in the first place evident that the arbiters were bound to conclude the submission entrusted to them within a period of three months, there being no period of duration fixed in the deed. All the commentators are of this opinion. We may cite Thomine Desmazures who at page 668 says: "Le délai légal et le délai conventionnel ne paraissent devoir être suspendus ni par la maladie, ni par l'absence des arbitres, ni même par des événements fortuits, si de tels accidents arrivent il en résultera que les parties seront délaies de compromis, elles pourront le renouveller en proroger le délai, si elles le veulent, mais elles n'y seront point forcées, leur intention présumée a été d'être jugées dans ce délai et si cela n'est pas possible elles sont déchargées de leur obligation." The authority of Carr and Chauveau is to the same effect; they say Vol. 6 Part. 2 Question 3232 bis. "Les décisions de la Cour Suprême nous paraissent bien fondées et conformes au vœu de la loi qui, faite par les parties de fixer un délai, en établit un de trois mois, lequel est le même dans tous les cas. Tous les inconvénients qu'on prétendrait faire résulter de la généralité des termes de l'article 1007 s'évanouissent devant cette considération que les parties sont toujours libres de convenir d'un terme et de proroger les pouvoirs des arbitres soit pendant les trois mois que la loi leur donne afin de procéder à leurs opérations, soit même après ce temps. Si elles négligent de remplir cette formalité et de manifester ainsi leur intention elles ne doivent pas se plaindre, si, sur la demande de l'une d'elles, le compromis est annulé."

Dalloz in his "*jurisprudence Générale* Verbo "*arbitrage* No. 690" lays down the law to the same effect and says, that the Courts cannot extend the legal delay of three months upon the pretext that in conformity with the object

f the submission, which was a liquidation which was certain to last several years, it was n the intention of the parties to carry on the delay to the end of the operation.

But the defendants plead that they are entitled to shew by parole evidence that the plaintiff has by his fault and gross negligence prevented the arbitrators from coming to a decision.

This allegation is quite general and no instance is given, or incident alleged in which that fault and negligence consist. In their argument at the Bar they explained these words of fault and negligence to mean that they wish to prove that the plaintiff had done nothing, had not seen his own arbitrator nor produced any document within the delay of three months. Here we recall the fact that the deed of arbitration itself obliged the parties on the first request of the arbiters to produce to them all documents and give them every information applicable to the affair submitted, and as the arbiters had all the rights and powers of Courts of law the first step of the defendants should have been to call upon the arbitrators to pronounce an order to compel the plaintiff to put in his documents and make his comments upon those produced by the defendants. If he failed to do that, the defendants were then entitled between the fifteenth day before the expiry of the commission and the day of its expiry to ask a decision by default from the arbitrators based upon the documents produced, and the statement made to them by the defendants themselves. Each step of the procedure indicated is justified by the law of the Code of Procedure upon arbitration. But in place of doing this so far as appears during the three months of the continuance of the arbitration, which expired on the 24th september 1875, neither the defendants asked for any order, nor did the arbiters pronounce any, and it is not until after the submission had expired and when any judgment thereon would have been a nullity, and when it would not be necessary even to make an appeal against the judgment (See Art. 1028 C. O. P.) that, on the 5th October 1875 Mr de Mazérieux writing to Mr Raoul, says that he has seen Mr Crécly de Lanux only yesterday, and that he promised to attend on that day and give him certain information. Now this is the sole document which was quoted to the Court as showing the manner in which the plaintiff has impeded the arbiters from giving a judgment. It is enough to point out that this and the other letters produced are all after the date of the

expiry of the submission, and it seems to us that no hindrance would have been relevant to infer a preventing of a decision unless it occurred within the three months.

It is true that Thomine Desmazures in a passage following that above quoted from his book, lays it down that as the act of a party his dole, or his fraud, cannot put an end to his obligation, the course of the delay will be suspended in regard to that one of the parties who may have hindered the arbiters from deciding by incidents designedly brought up (par des incidents suscités à dessein) and then in a later passage of the same book at page 672 he lays down doctrine to the same effect, but it is to be noticed that in that passage the author supposes that the negligent party has produced his documents and given his statement just before the fifteen days have begun to run, and he then says there must be time given for the communication of these to the other party, so that the arbiters would always have fifteen days for their decision.

The author referred to is speaking of a very different state of facts from that which occurs in the present Case. Pigeau page 65 Note I, in speaking of the same law refers to the case decided by the Court of Metz, the report of which will be most easily consulted in Dalloz Verbo arbitrage No 665.

In this case, just before the arbiters were about to decide, one of the parties who had already obtained several delays made a challenge (récusation) of one of the arbiters, on the ground that he had become a creditor of his after the compromise.

This incident, the challenging party carried through various Courts, and it having been decided against him he then pleaded that the arbitration had become prescribed under article 1007, and that the judgment given after the expiry of the delay was null. The Court of Metz refused to sustain that plea on the ground that it was against equity that one who had obtained several delays, and then proposed a challenge in which he had failed, should argue that in consequence of his own deed and the delay which he had himself created that the arbiters had ceased to have any power to pronounce a judgment. If the facts of the present cases were similar to those of the case of Metz, if any similar incident had occurred, if they were proved in the same way by the records of a Court, we would have no hesitation in laying down the same law, but we ask where are the incidents



well or ill-founded which have been intentionally raised to prevent the arbiters from acting within three months; what are the facts beyond a general allegation of negligence upon which the defendants rely? So far as we can judge all parties waited until the submission had expired, and not until that occurred was anything proposed to be done.

The general principle of law is, that the arbiters may decide every incident, which may arise in the course of the case submitted to their decision and which arises naturally out of the case, but this must be done during the course of the submission and before its expiry. Even the necessity of deciding such incidents does not prorogate the submission to a later date than that fixed by the deed or the law.

In discussing this point Carré and Chauveau in answering objections arising from supposed inconvenience say that the law by making no distinction in the article 1012 of C. C. P. set forth that it has presumed that every incident has been exhausted and every interlocutor executed in the delay fixed by it or the submission; and that the law has consequently determined that the parties should prorogate the submission if the impossibility of decision within the time be made clear. It may be argued that by article 1015, if a charge of forgery or some criminal incident occur, the arbiters may give up the arbitration for the time being and the delays of the arbitration will continue to run from the day the incident is determined. So by article 1013 death does not put an end to a submission. It may be said that the law having in these cases admitted prorogation of the delays, that principle should be admitted in other cases. But the true interpretation of these articles is that the law having provided only for these two cases there would have been no need to do so, if it had been intended to establish a general rule that every incident would prorogate the delay. In short the existence of these two articles furnishes a strong argument that no incident except those referred to will prorogate a submission. Here a distinction must be made between those incidents which arise within the competence of the arbiters and those which are beyond their competency. It was with reference to an incident of the latter kind that the Court of Metz gave its famous judgment, and as Carré and Chauveau say of it (Q. 3222 Vol 6 Part 2) "par les restrictions mêmes dont cette décision est entourée, on voit qu'elle n'est qu'un assez faible palliatif à l'inconvénient que nous

"venons de signaler." We conclude then that this Court cannot extend the legal delay of three months within which the arbiters in the deed in question ought to have decided the questions submitted to them, simply on account of a mere failure to do something, which the arbiters had it in their power to correct within the specified term.

It was also argued that parole evidence was competent to prove the facts alleged by the defendants. It is to be kept in mind that a submission is only valid if it is reduced to writing, and all prorogations thereof and incidents that arise thereon ought in our opinion to be proved by writing also. It is true that there is such a thing as tacit prorogation, but we think Bioche right when he lays it down that the facts showing it should be proved by writing (Bioche arbitrage No. 325) though he goes on to admit (No. 326) that the appearance of all the parties before the arbiters and their respective pleadings (plaidoiries) after the expiration of the delay, show sufficiently their intention to prorogate the arbitration. But in this kind of prorogation the joint consent of the parties is necessary, and therefore he properly goes on to say that it is otherwise if one only of the parties has appeared and asked for conclusions before the arbiters; no reciprocal right existing in the latter case, any one of the parties interested may demand the nullity of the decree and of the arbitration. In these remarks we have answered the defendants' Counsels' arguments on tacit prorogation. He founded on the fact that Crecy de Lanux had had an interview with his arbiter on the 5th October; but this one-sided act is wholly insufficient to create a tacit prorogation. For these reasons we refuse the motion that subpoenas do issue and for a rogatory commission, and also repel the defendants third and fourth pleas in law. Costs reserved.

## SUPREME COURT

CLAIM BY A WIDOW TO A PORTION OF THE SUCCESSION OF HER LATE HUSBAND—PARTIES MARRIED IN INDIA.—ENGLISH LAW BEING THE LAW OF THE HUSBAND'S DOMICILE HELD TO BE APPLICABLE.

*The plaintiff is the widow of Mr T. Packenham a British subject who died in Madagascar in 1883. The parties were married in India, and resided several years in Mauritius.—*

*During their stay in Mauritius the deceased purchased several immoveable properties there. The Plaintiff claims the half of the immoveable properties left by her husband; or at least one third of the real Estate in usufruct, in virtue of her right of dowry if the law of England is to be applied.*

*he Heirs of the deceased raise no objection to Plaintiff's application as far as the moveable property is concerned, but they object to her claim to the Immoveable property on the ground that her marriage having taken place in India without contract, the spouses must be presumed to have adopted the law of England, which excludes the community of goods between husband and wife—and the law of Mauritius cannot be invoked as it does not admit the right of dowry.*

*The Court held that the parties having been married in India where neither were domiciled, the presumption is that the Plaintiff contemplated that the law of England, which was the law of her husband's domicile was to be the law which would govern her matrimonial rights, and that accordingly she is not entitled to half of the real Estate of her late husband in Mauritius, but that she has a right to claim from her husband's heirs the usufruct of the third of the value of the Immoveable property of her late husband situated in Mauritius.*

*Further that the Curator of Vacant Estate be divested of the Estate of the deceased in favor of his Heirs and widow.*

*Costs of parties to be recovered out of the Estate.*

—  
WIDOW PACKENHAM,—Plaintiff

versus

CURATOR OF VACANT ESTATES  
AND ORS,—Defendants

—  
Before

His Honor EUGÈNE JULES LECLÉZIO,—Chief  
Judge

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—  
Puisne Judge

and

His Honor LOUIS VICTOR DELAFAYE,—  
Acting Puisne Judge

GEORGE GUIBERT,—Counsel for Plaintiff  
HENRY LÉCLÉZIO,—Attorney for the same

HON. W. NEWTON,—Counsel for Defendants  
EVENOR GANACHAUD,—Attorney for the same

—  
Record No. 22,674

8th December 1884.

The plaintiff in this case is the widow of the late Thomas Conolly Packenham who died last year in Madagascar where he was British Consul. They were married at Madras in India and resided for some years in Mauritius before they went to Madagascar. During their stay in Mauritius the deceased purchased several immoveable properties here, and widow Packenham now claims the half of the moveable property as well as the half of the real Estate situate here, and left by her late husband, or at least one third of the real Estate in usufruct in virtue of her right of dowry if the law of England is to be applied to her case.

The heirs of Thomas C. Packenham, a brother and a sister who reside in England, have no objection to the application of the widow of their late brother in so far as the moveable property is concerned, but they object to any claim upon the immoveable property situate in Mauritius on the ground that her marriage with the deceased having taken place in India without any marriage contract or settlement the spouses must be presumed to have adopted, by a tacit contract, the law of England as the law which was to settle their matrimonial rights, and the heirs contend that according to the law of England, which excludes community of goods between husband and wife, the widow cannot claim the half of the real estate of her late husband, and on the other hand that our own civil law not admitting the right of dowry which belongs to the widow by the law of England, such right cannot be invoked by the plaintiff in Mauritius.

In this case it was admitted, and there can be no doubt that there was no domicile of selection on the part of the spouses when they married, they were accidentally in India and, although the lady is a Mauritian by birth, nothing shows that they intended to settle in Mauritius. The deceased had an English domicile and his now widow, a Mauritian domicile, the presumption is therefore that

*The Court held that the letter in question refers to no arrangement between the parties subsisting before the letter was written, save that as regards the "Legentil" canes of November 1861, that the Plaintiff might be willing to sell them; a reference which applies to possible prospective agreement rather than to an existing one.*

*Application refused with costs.*

FERRAN,—Plaintiff

*versus*

HEWETSON,—Defendant

Before

His Honor EUGÈNE JULES LECLÉZIO,—Chief Judge

His Honor FRÉDÉRIC CONDÉ WILLIAMS,—Puisne Judge

E. GALLET,—Counsel for Plaintiff  
E. CHAILLET,—Attorney for the same.

Hon. W. NEWTON,—Counsel for Defendant  
H. BERTIN,—Attorney for the same.

Record No. 22,328.

10th December 1884.

This is a case referred from Chambers. The Plaintiff seeks to support by parol evidence his claim to a sum of money exceeding 150 francs, his alleged share of the produce of some canes planted by him whilst manager of the Defendant's Sugar Estates "L'Etoile," and crushed by the defendant in the ordinary course of sugar manufacture upon the Estate. The planting and crushing are alleged to have taken place in the course of the three years 1859, 1860 and 1861, and, as these operations were not undertaken under the terms of any written memorandum or agreement, such as is required by article 1341 of the Civil Code the question for us is whether the plaintiff can satisfy us that there has been any "*commencement de preuve par écrit*"

to bring the plaintiff's claim within the exception of Article 1347, and to justify the Court in admitting parol evidence in support of it.

As a matter of fact, the plaintiff's claim is for half the produce of some seventy acres of sugar canes crushed at "L'Etoile" sugar mill in the years 1860 and 1861, the seventy acres forming two portions of ground known as "Terrain Le Gentil and Terrain Chauvin."

This claim must of course be based on some agreement on the subject of these canes between plaintiff and defendant and such an agreement was all the more necessary because plaintiff was defendant's manager and presumably, superintended all the operations of the Estate "L'Etoile" both of planting and crushing. It is for us to consider what "*commencement de preuve par écrit*" of this agreement has been obtained by plaintiff from the defendant.

Upon his personal answers the defendant declared that Terrains Legentil and Chauvin formed a portion of "L'Etoile" Estate, and said that the canes grown upon these two plots of ground were to the best of his knowledge crushed along with the other Estate canes at "L'Etoile," without any distinction. He denied that the plaintiff had any property in those canes, or any such right as he claimed to a share of their produce. A letter from himself to plaintiff, dated the twenty second day of November eighteen hundred and sixty-two, was however, shown to him, in which, on the occasion being that of Ferran's resignation of the managership of the Estate towards the close of 1861, the defendant writes of the Le Gentil canes that "he thought the plaintiff was willing to sell them to him (defendant) and so had cleaned them as if they belonged to the property." The letter concludes by expressing a desire that the plaintiff may come to some terms with the defendant upon this point. Thus while in his personal answers the defendant denied to the plaintiff any rights at all in this matter, his letter acknowledges the plaintiff's possession of certain rights in the canes of Le Gentil in November 1861, and possibly before that date.

It is not, however, upon the rights in the terrain Le Gentil of November 1861, whatever they may have been, that plaintiff grounds his claim in the action, but, as has been already stated upon some agreement under which canes planted on terrain Le Gentil and terrain Chauvin in 1859 and 1860

at was the "quotité disponible" under French law and stated that "Le Code il n'ayant pas admis le douaire, soit legal conventionel, il est inutile dans le prod'en rechercher le caractère ou les effets." The Court of Cassation confirmed this decision with regard to the reduction of legacy, but appears to have examined the character and effects of the "douaire" for we find one of its "Considérants" "et si cette disposition créée au profit de la femme un tiers d'un tiers qui peut être augmenté sous restriction par le mari soit par contrat de mariage soit par testament, la loi française n'admettant pas le douaire, la veuve ne peut en réclamer l'exercice sur l'immeuble français à l'encontre des héritiers réservataires, ou de leurs ayant causes" further "que l'application à l'immeuble français soit de la législation en vigueur dans l'état de Virginie soit des dispositions testamentaires.....aurait pour résultat si elle s'opérait à titre de convention matrimoniale constitutive d'une dette du mari envers sa femme, de porter atteinte aux principes d'ordre public qui, dans le Code civil protègent les droits des héritiers réservataires."

The allusions made to the "douaire" have been criticized by the annotator who commented upon that "arrêt."

But, whatever may be their value in a general point of view if we read carefully the "Considérants" of the Court of Cassation we see that the only grounds of public policy relied upon by that Court are those provisions of the Code enacted in favour of certain heirs from whom a portion is legally secured (héritiers à réserve) and it may well be that if the question of *douaire* submitted to the consideration of that Court, had resolved itself into a question of right to the usufruct of one third of the moveable estate as claimed here, and, if the case had been a brother and a sister having each a right to a reserve, as in this case also, the Court of Paris and the Court of Cassation would not have attached the same importance to the expression "douaire." For our own part we do not think that the issue which we are now to decide has been determined by the *arrêts* quoted and we fail to see what are the grounds of public policy that can be invoked in the present case against widow Pakenham when she asks in virtue of the law of England that the Court should declare her entitled to a dowry which is nothing more than the usufruct of one third of the value of the real estate owned by her husband in Mauritius at the time of his death.

If instead of a right claimed under her matrimonial law it had been one in virtue of legacy made to her by her husband, such a legacy would have been perfectly legal; and the fact that the right is claimed in virtue of a law instead of resulting from a will is not sufficient to warrant us in rejecting it when we find nothing in our local laws contrary to the claim made in virtue of a foreign law adopted by the tacit contract of parties.

We must therefore, applying the law of England as a whole to the present case, rule that the plaintiff has the right to claim from her husband's heirs a life estate of one third of the immoveable property situated at Mauritius or in other words the usufruct of the third of the value of that property.

The judgment of the Court is that the Curator is divested of the estate of the late Thomas Conolly Pakenham in favor of his heirs and widow, as above indicated, under the ordinary conditions with regard to his fees.

Cost of parties to be recovered out of the Estate.

## SUPREME COURT

CLAIM OF PRODUCE OF CANES ALLEGED TO BELONG TO PLAINTIFF AND CRUSHED BY DEFENDANT. — COMMENCEMENT DE PREUVE PAR ÉCRIT.

*In this matter the Plaintiff claims half the produce of some seventy acres of sugar canes crushed at "L'Etoile" Sugar Mill in 1860 and 1861 and growing upon land known as terrains "Legentil" and "Chauvin." As the operation was not undertaken under the terms of any written memorandum or agreement, such as is required by article 1841 of the Civil Code the question for the Court was whether the Plaintiff could satisfy it that there had been any commencement de preuve par écrit.*

*The defendant when put upon his personal answers denied the Plaintiff's claim.*

*A letter from Defendant to Plaintiff of 22nd November 1861 was produced in which the Defendant expressed the thought that Plaintiff was willing to sell to him the canes on the land "Legentil."*

that the first step required under the procedure in this Court is that the act of marriage must be produced, and it has been supposed that by the production of the act of marriage the parties were sufficiently identified. But I must say that I think that is not sufficient evidence of the fact that there is a special person from whom the petitioner wishes a decree of divorce. Browne in his work on the Law and practice in Divorce and matrimonial cases at page 274 says under the heading *proof of marriage*:

"This is usually supplied by the production of an examined copy of the register, or one purporting to be signed by the proper officer or person and *some evidence of identity* that the persons named in the register are the petitioner and respondent." Then quoting the opinion of the Judge of the probate and Divorce Court. "Identification is a question of fact, to be proved like any other conclusion of fact, and established either by direct or circumstantial evidence, it was urged by the co-respondents' counsel that a direct oath to the identity of the respondent was necessary; but to hold the rule thus stringently and to require the direct oath of a witness would be to add nothing in many cases to the cogency of the proof while it might add much to the difficulties attending its production."

The question then is one which may be proved like any other conclusion of fact and established either by direct or circumstantial evidence. If the petitioner had cited the respondent to attend here to day she was not bound to obey the citation and the petitioner's evidence might have been made no stronger thereby, and certainly it would be competent to put in the citation under the hands of the usher and to shew to the Court that he had done everything in his power to identify the respondent. Formerly it was not competent to prove identity by means of photographs, but now in England photography is used almost every day in order to prove the identity of the person. A photograph of a person is obtained, the man swears it is his wife's, other persons who have seen the act of adultery swear that it is the photograph of the person who was found committing the act, and in that way the evidence is supplied. We have nothing of the kind adduced in this case and the question to day here is whether there is sufficient evidence to enable the Court to come to the conclusion that this woman Eleondr Narina the person mentioned in the petition as the wife of the petitioner and the

respondent in this case and the person named in the act of marriage is the person upon whom these proceedings have been served and who has been cited in this Court. Undoubtedly the only evidence that we have is that is the word of this man as to what took place at the time of the constables going there. It appears that the petitioner Barbe applied to the Magistrate for a warrant in which his wife was described as Eleondr Narina. That warrant was executed by the two constables Mungra and Dowson, and Mungrah swears that he read the warrant to the woman and he follows that up by saying that both the woman and Colin admitted the charge before the Magistrate. That is not all the evidence, for we have Deane who says that Albert Barbe speaking to his wife said he was her husband that was when she was found by the constables and she said yes. That same woman was brought before the Magistrate and convicted and sentenced to eight days imprisonment, and the question for us to consider to day is whether in our minds we are morally convinced that that woman is the person upon whom these proceedings have been served and whether she is the wife of the petitioner; my learned brother and myself have no doubt that there is circumstantial evidence sufficient to entitle the Court to proceed upon, though it may appear somewhat narrow and narrow have been much stronger, I would add that it is very expedient that petitioners should remember in future cases that the question of identity is a matter of importance, but looking to the looseness of the practice which has hitherto existed, and looking to the fact of the circumstantial evidence in this case and that the woman Narina admitted that she was the wife of the petitioner, we have no doubt that we ought to pronounce the ordinary decree "nisi."

## SUPREME COURT

APPEAL — ADULTERY. — IS IT ABSOLUTELY NECESSARY THAT A SPECIAL ALLEGATION OF SPECIAL OCCASION BE MADE IN CHARGES OF ADULTERY. — CONVICTION QUASHED ON MERITS.

*This is an appeal from a judgment of the District Magistrate of Plaines Wilhems who convicted the Appellants to imprisonment on a charge of adultery. — The Appellants urged that on a case of adultery*

*there must be a special allegation of the special occasion on which the adultery was committed.*

*The Court expresses the opinion, without laying it down as positive law, that a relevant charge of adultery in a Criminal Court may be made by alleging that the accused for a certain period lived as husband and wife.*

*On the merits of the case the Court quashed conviction.*

CATTO the wife & anor,—Appellants

versus

THE QUEEN,—Respondent

Before

His Honor E. J. LECLÉZIO,—Chief Judge

and

His Honor ANDREW MURE—Puisne Judge

Hon. WILLIAM NEWTON,—Counsel for the Appellants

A. PITOT,—Attorney for the same.

JOHN MC. DOUGALL GIBSON,—Substitute Procureur and Advocate General,—Counsel for Respondent

JULIUS GUIBERT—Crown Attorney, Attorney for the same.

Record Number 521

JUDGMENT OF HIS HONOR MR JUSTICE MURE

12th December 1884.

This is an appeal from a judgment of the acting District Magistrate of Plaines Wilhems, which sentenced two persons Marie Madeleine Catto and Alcide Anthony to imprisonment, the one for one month and the other for two months on the ground of adultery. Objections to this judgment have been taken, and the chief objection urged was that even in a case of adultery there must be a special allegation of a special occasion upon which the adultery was committed.

The information in this case is to the effect

that for about two years Marie Madeleine and Alcide Anthony have been living together in a state of adultery at Curepipe. This charge was made on the 10th of September last. In reference to the objection taken by the Counsel for the appellants, I am not prepared to give effect to it in the absolute manner in which it was pleaded to this Court. It seems to me that it is perfectly possible that a relevant charge of adultery in a civil action may be made by alleging that the parties have lived together for a certain period of time at bed and board and as husband and wife. It is quite fixed law that that would be relevant in a civil Court in an action for divorce and while I do not wish to lay down any positive law in what I am now saying, I think that it ought to be sufficient as an averment in a criminal Court for it must be remembered that whether we are dealing with this matter civilly or criminally we are always dealing with a matter that is criminal in its nature and I think that the Courts in Great Britain, at any rate have been as careful in their mode of requiring the allegation to be made in the Civil Court, as we could be in any Criminal Court in this Colony—while that is my view of the general argument that was made by the Counsel for the appellants, there was in the next place a very strong argument made by him on the text of the law in reference to the accomplice, for the text of the law in the 255 section of the Penal Code is to the effect that the only evidence that can be admitted against the person accused of being an accomplice shall *besides the deed itself* be such as may be deduced from letters or other documents written by the party so accused, in other words the accomplice is only to be convicted if found in the position of what is called in french *le flagrant délit*. That being the case in regard to the accomplice and if that is the evidence that is necessary to convict, it is perfectly clear that in reference to the charge made against him there is a strong argument from that part of the law that there shall be a special charge of adultery brought against him. I doubt very much, therefore, the relevancy of the present charge in consequence of this special provision of the law.

When we come to consider this case on the merits we see that the information was sworn on the 10th September; on the evening of that day, after the date of the information, the complainant and the police went to the place and found the two people together. We have evidence of the fact that the woman and the man were found together in a room

at a date subsequent to the information which was laid against the parties. We have simply that fact proved, and sufficiently proved undoubtedly by the Constables and by the complainant, but the only other evidence that bears on this information is the evidence of a man named Cawthorn, who says that he knew these people had been living together as husband and wife since 1882, but, he adds "after June 1882, I never saw the two accused in any house but "I have seen them together in the streets, "I have seen them there often." Now this information sworn on the 10th September says that for the last two years they have been living together. What evidence have we then in this case to support the information? We have evidence of a fact before its date and we have evidence of a fact after its date, but not one particle of evidence that bears upon the time that is alleged in the information. Now on this ground I am unable to say that the Magistrate had ground for sentencing these parties to imprisonment. It seems to me and I regret to say it, that there has been a miscarriage of justice here which could easily have been obviated by the police directing this man to file a new information founded on the fact that they had found these people together in the same room on a definite occasion after the date of the warrant. That, however, does not seem to have been thought of, and in the circumstances of the case I see no other alternative, and I believe that my learned brother in the chair concurs with me, than to hold that there is no evidence at all which supports this information and that therefore the conviction must be quashed.

JUDGMENT OF HIS HONOR E. J. LECLÉZIO

12th December 1884

I do not wish to express any final decided opinion upon the question of knowing whether the information would have been sufficient in law in order to obtain from us a ruling confirming the decision of the Magistrate, if there had been clear evidence that the two persons had been living as husband and wife during the period of two years mentioned in the information. The point that was raised was first that the information was not sufficient in law because it was necessary to aver a special act of adultery and 2o. that there was not sufficient evidence of the fact

alleged to go to a Jury as was pointed out by my learned brother, there was no evidence proving that those two persons have been living in a state of adultery within the time alleged in the information, and it is on that account that I cannot sustain the judgment of the Magistrate and I think that the conviction should be quashed. As was remarked also by my learned brother, it would have been very easy for the complainant in this case to file a new information after those two persons had been found together by the police, for the general course is, first, to obtain a warrant from the Magistrate in order to enable the police and the Complainant to catch the two parties in *flagrante delicto*, as is required by the Penal Code in regard to accomplice, and that being done to file an information complaining of this special act of adultery.

This has not been done, and for this reason I think that the conviction should be quashed.

## SUPREME COURT

CLAIM OF MONEY FROM A NOTARY ON THE GROUND THAT THE NOTARY, AS PLAINTIFF'S LEGAL ADVISER, HAD FAILED TO WARN PLAINTIFF THAT HE WAS IMPRUDENTLY INVESTING MONEY WHICH WAS IN THE SAID NOTARY'S HANDS, WHEN IT WAS ALLEGED THE NOTARY WAS AWARE THAT THE INVESTMENTS WERE BAD.—CASE DISMISSED.

*The Plaintiff claims a sum of 24,000 £s. from the defendant under the following circumstances.*

*The Plaintiff alleges that the Defendant was entrusted with the liquidation of his late father's succession, and that he (the defendant) was towards the Plaintiff in the position of a Notary, a paid Agent, and legal Adviser.*

*That in that capacity he received on Plaintiff's account Rs 54,000, the share accruing to him from his father's succession, that the Plaintiff consented to lend Rs 12,000 to one of his relatives, Mr Cauvin, to buy a share in Defendant's Office; that as Plaintiff's Agent, Notary, and Legal Adviser, the Defendant could not legally receive and pocket this money, which he knew Cauvin would not be able to reimburse.*

20. *That the Plaintiff purchased a share of the Distillery "the Queen" of which the Defendant was Manager, and that he the Defendant advanced Rs 7,000 of the Plaintiff's money as an investment upon the said Distillery.*

*That the defendant knew or ought to have known that the speculation was a bad one, and he should have warned the Plaintiff against it, instead of inducing him to risk his money in a hopeless enterprise.*

*Cauvin is unable to pay the plaintiff; and the "Queen" Distillery has been sold by forcible ejectment for a price hardly sufficient to satisfy the vendor's privilege.*

*The Court held that it was unable to gather from the facts or documents in the case that the Plaintiff had constituted the Defendant his Agent—that the Defendant does not seem to have been consulted regarding Cauvin, beyond being asked whether he would accept him as a partner. There is no allegation that the consent to the retention by Defendant of the money lent to Cauvin by Plaintiff was given by error or extorted by fraud or violence, it is shewn that the Plaintiff ratified all that had been done and had received two instalments of the amount he had lent to Cauvin.*

*The Court held that it could not disturb the agreement for the purchase of the share in the Defendant's Office.*

*With regard to the "Queen" Distillery it was established that the Defendant had embarked several of his relatives and his wife in the speculation, there is no proof that he considered it dangerous. He moreover proposed to Plaintiff to withdraw from the concern, at the same time offering to pay him the 7,000 Rs he had invested, the offer was declined by the Plaintiff.*

*The Court dismissed the action with costs.*

ALPHONSE LANGLOIS,—Plaintiff

versus

CLÉMENT PITOT,—Defendant

Before

His Honor ANDREW MURE,—Puisne Judge

and

His Honor LOUIS VICTOR DELAFE,—  
Acting Puisne Judge.

P. L. CHASTELLIER,—Counsel for plaintiff  
V. G. DUCRAY,—Attorney for the same

L. ROUILLARD,—Counsel for defendant  
P. E. DE CHAZAL,—Attorney for the same

Record No. 22,335

24th December 1884.

The plaintiff in this suit, seeks to recover from defendant who is a notary public, twenty four thousand rupees (the original figure having been reduced by nineteen hundred rupees) with interest at nine per centum per annum from the 18th January present year, with arrest in execution under article 4 of Ord. 16 of 1869.

The declaration avers : that the defendant in his capacity of notary public was entrusted with the liquidation of the succession of the plaintiff's father, who died on the 5th day of November 1880, leaving an Estate of upwards of two hundred thousand rupees, that the defendant was towards plaintiff, in the position of a notary, of a paid agent, and of a legal adviser, that in that three-fold capacity, he cashed for plaintiff's account fifty four thousand rupees, the share accruing to the plaintiff from his father's succession ; that out of that sum which he would not have had in his hands, had he not been the notary of the succession, the defendant illegally retained and unlawfully applied twenty four thousand rupees to his own affairs, to the prejudice and loss of plaintiff and with a view to benefit himself, that the transactions under color of which these sums were appropriated are illegal ; that the payments made in consequence are null and void, and constitute to say the least a gross "faute" on the part of the defendant, and that he is therefore bound to make good to plaintiff the damage caused by his wrongful doings.

The facts, as proved by the oral and documentary evidence may be briefly summed up as follows :

The transactions which the plaintiff impugns are two in number. Prior to his



father's death (Nov. 1880) the plaintiff who is a relative of the defendant had been for some time a clerk in the office (Etude) of the defendant. The plaintiff's father had expressed his intention of buying for his son a share in that office, should he be found, after some training, to have the necessary aptitudes. Immediately after his father's death, the plaintiff withdrew from the office, and in his lieu and stead a relative of his, one Cauvin, became a partner in the office. Cauvin had no means of his own to pay for the share he bought. Langlois lent him the rupees 12000 which was the price stipulated by Pitot, and took from Cauvin a "bon" for a similar sum. Pitot by agreement debited Langlois with Rs 12000. Langlois has since received on that sum two instalments of one thousand rupees each and interest at 9 p. o/o from December 1880 to September 1883. On the 18th of September 1881, Pitot furnished to the plaintiff an account of all sums he had received for him and of all the payments made on his behalf the transaction relative to Cauvin is thus referred to, on the debit side of the account "25th November 1880. Part Cauvin 12000 Rs. That account was handed over to Langlois who examined it and wrote at the bottom of it "approuvé" A. Langlois 13th September 1881."

As regards the second transaction it arose under the following circumstances :

Auguste Pitot the defendant's brother, who is now dead, bought in the beginning of 1881, a distillery called "The Queen" and according to a deed of partnership under private signatures, it appears that the purchase although made in the name of Auguste Pitot, was in reality made for several parties of whom the plaintiff was one ; the co-partners owned the distillery in the following proportions :

Auguste Pitot .....	$\frac{4}{24}$
Jules Loumeau .....	$\frac{4}{24}$
Madame Clément Pitot .....	$\frac{2}{24}$
Jules Cauvin .....	$\frac{2}{24}$
Alphonse Langlois .....	$\frac{8}{24}$

The deed of partnership is signed by Langlois so also is a deed accompanying it and purporting to be an "acte de dépôt" of the deed of partnership. In the account of the 13th of September 1881, the following entries should be noticed :

" Pour les  $\frac{8}{24}$  part Alphonse Langlois dans  
" la distillerie " Queen".....5000 Rs

" pour la moitié des avances faites à ce jour  
" à " Queen" à titre de placement productif  
" d'intérêts à 9 o/o l'an payables tous les six  
" mois, le dit Capital à rendre par portions  
" de mille roupies sur les bénéfices de " Queen"  
" sept mille roupies .....Rs 7000

It is established that Pitot proposed to Langlois, before he signed the account to withdraw from the concern if he felt at all uneasy about it, offering at the same time to pay him the 7000 Rs ; that offer was declined by Langlois, the account was approved and signed as we have seen above.

Upon these facts, Chastellier of Counsel for the plaintiff, argues that the two transactions are illegal and null ; that situated as he was with regard to Langlois, Pitot could not legally receive and pocket 12000 Rs for a share in his office which was bought, it is true by Cauvin, but which was paid for with money belonging to Langlois and of which Pitot had the custody as his notary, his agent and his legal adviser ; that he knew that Cauvin would not be able to reimburse the amount borrowed from the plaintiff ; that the sole object of Pitot was to retain the 12000 Rs and use them for his own purposes.

But the second transaction is, in the opinion of the learned Counsel for plaintiff, still worse than the first and altogether indefensible. Pitot was the manager of the Queen—he knew or he must have known that the speculation was a bad one ; he should have warned Langlois against it instead of inducing him to risk his money in a hopeless enterprise. The advances, if any were made, for there are no vouchers showing that the sums had really been expended for the distillery, were advances made by Pitot himself, and when he wrote the entry relative to them in the account of 13th September 1881, he knew that he was benefiting himself and was fully aware that the affairs of the distillery were in a hopeless condition—Cauvin is unable to pay Langlois. The "Queen" has been sold by forcible ejectment and the price fetched at the Master's bar, has been hardly sufficient to satisfy the vendor's privilege. Pitot has been guilty of a gross breach of professional duty he is responsible and must refund the 24,000 Rs : the learned Counsel quotes Art. 1382 C. C. and Art. 1991, 1992, 1993 C. Civil. Eloy de la responsabilité des notaires Vol. 2 pages 170 and following—Dalloz repertoire verbo responsabilité—Pigeot, Piston's report 1861 page 3.

Rouillard for defendant urges that the declaration contains very grave accusations but at the evidence has not substantiated them. Plaintiff was not an incapable—it is not shown that he was without intelligence—if he did not manage his own affairs successfully, the defendant cannot be answerable for the losses he may have suffered. Pitot was simply entrusted with the liquidation of the succession of the late Mr Langlois—he had to draw up a deed of partition and after the assets had been realized, to determine the share accruing to each heir—his mandate did not go beyond that; he has accounted to Langlois for his share; the two transactions complained of appear in black and white in the document of 13 Sept. 1881.

Langlois was pleased to lend Cauvin, a near relative of his, a sum of money to enable him to buy a share in an apparently thriving business. He took a “bon” from him, received two instalments upon the “bon”, and cashed the interest upon the sum due in virtue of the “bon.” He entered into a partnership for the working of a Distillery thinking it would be a profitable speculation, but it has turned out not to be so. It is not shown that defendant knew that the enterprise would not be successful, the reverse has been proved; he embarked his near relatives in it, and continued making advances to the partnership long after September 1881, and is finally a loser by Rs 20,000. His client acted throughout in a most liberal manner to Langlois and offered to allow him to withdraw from the concern, taking away his 7000 Rs.; no possible blame can be fixed upon his client and no responsibility can attach to him.

#### JUDGMENT:

The duties imposed upon notaries public are no doubt very important, and grave indeed is the responsibility with which the discharge of those duties is accompanied. Those officers are held out to the public as men in whom entire confidence can be placed, in the divers capacities in which they may be employed by those who are obliged or who wish to have recourse to their services, whether to draw up deeds, whether to act as agents or intermediary between parties. It is alleged here, that the defendant has transgressed his duties as a notary, and that he has misconducted himself as an agent and legal adviser; the defendant, as notary of the Langlois family had to liquidate the succession of the late M. Langlois; he had to fulfil all the re-

quisite formalities and to prepare all necessary deeds to arrive at that object and after realisation of the assets to account to each heir for the share accruing to him. But beyond this we cannot go. We fail to see by what principle of law or of equity we should be warranted in holding that a notary, appointed by a Judge or selected by the parties to proceed to the liquidation of a succession, is bound not only to account to each heir for the share which he is entitled to, out of the succession, but also to ensure to each of them a safe and profitable investment. We are unable to gather from the facts or documents in the case, that Langlois ever constituted Pitot his agent and ever looked upon him as his legal adviser. He seems on the contrary, to have throughout considered the defendant as a mere depositary, a sort of Banker upon whom he drew cheques which the latter was expected to pay at sight. We look upon the transaction regarding Cauvin as a sort of family affair about which Pitot does not seem to have been consulted beyond being asked whether he would accept, as a partner, Cauvin instead of Langlois; nor is there the least trace of his suggesting the arrangement in any shape. It is completely proved that the plaintiff asked Cauvin to go with him to the defendant to discuss the matter and that the plaintiff offered to lend Cauvin the money which was the price of the share in the “Etude.” It may have seemed quite natural to Pitot that Langlois should have been desirous of rendering a service to a gentleman who had recently married his own niece, nor do we think it strange that Pitot should have thought that Cauvin was not making a bad investment by taking a share in his (Pitot’s) office. At all events Langlois consented to give the money to Cauvin, and authorized Pitot to debit that amount to his account, and in order not to give effect to that consent, it would be necessary to prove that it was given through error or extorted by fraud or violence: Not only is no such allegation made, but it is shown that Langlois ratified all that had been done by signing the discharge to Pitot on the 13th of September 1881, more, he actually executed the contract by receiving two instalments upon the capital and interest during nearly two years.

We, therefore, consider that the agreement between Cauvin and Langlois for the purchase of the share in Pitot’s Office is one which we cannot disturb.

We must also come to the same conclusion

with regard to the other transaction. Langlois, who was of age, who was his own Master and who had the free disposal of his money, chose to enter into a partnership with several parties whose names are above mentioned, sometime in the beginning of 1881, and signed the deeds relative to the purchase and partnership, there were reasons in the plaintiff's own personal feelings and desires which account for his entering of his own free will into the partnership and signing these deeds which sufficiently account for the whole transaction without supposing that the defendant led a client unwarily into a trap for his own ends and purposes. In September 1881, when Pitot gave him an account of the moneys expended for him, he had before him the entry which we have above referred to; his attention was specially called to the item since he was offered to withdraw from the concern and take his money, the plaintiff declined the offer and preferred remaining a partner, that fact is sworn to by Pitot, by Cauvin a relative of Langlois and by Duclos his brother in law, and is indeed but feebly denied by the plaintiff. He signed the account presented to him and approved of it as it stands and up to June 1883, he received interest upon the 7000 Rs mentioned in the last entry of the account and gave receipt worded as follows: "1er Juin 1883, Reçu de M. C. Pitot la somme de cinquante deux roupies et 50 c. pour un mois d'intérêts sur la distillerie "Queen" échu le 31 Mai, signed A. Langlois."

And the receipt dated 1st of February 1883 is still more complete inasmuch as it contains the words "les intérêts de ma créance sur "Queen."

The plaintiff reflected nearly two years over the transactions and yet he granted a series of receipts which must be held to homologate the *bona fides* of the transaction from his own point of view. If he was to repudiate it as a transaction into which he had been unfairly surprised surely his duty was at the earliest moment to indicate that and to repudiate the transactions. But these receipts show that long after he must have known the true position of matters, he was willing to hold it a good and fair transaction and accept the supposed profit upon it.

We have no proof that Pitot, at the outset, thought that the purchase of the "Queen" distillery was a dangerous speculation, he

embarked in it several of his relatives and his own wife.

Further when the settlement took place between the plaintiff and defendant, Pitot does not seem to have lost confidence in the undertaking, and he gave Langlois a chance of retiring from it with his money, and he swears and is in this confirmed by Cauvin that he went on making advances to the partnership which ultimately left him a creditor of the "Queen" in a very large sum. We do not find, in the evidence, proof that Pitot, throughout all this acted with bad faith. We have carefully considered the authorities quoted, and we have not been able to find a case in which a party situated as plaintiff is in the present suit, has been held to have a right of action against a notary placed in Pitot's situation in respect to plaintiff; whilst considering that it would have been wiser and more delicate on the part of defendant to have abstained from having anything to do with money affairs in which plaintiff was concerned, yet we cannot come to the conclusion that proof has been adduced of any breach of trust or dereliction of duty, or gross misconduct which would render defendant liable in damages.

We hold that plaintiff has not made out his case, and dismiss the present action, with costs.

### SUPREME COURT

ACTION FOR RECOVERY OF AMOUNT OF A BOND SUBSCRIBED TO GUARANTEE THE FAITHFUL PERFORMANCE BY A PUBLIC OFFICER OF HIS DUTIES.—ACTION DISMISSED ON PLEA THAT THE PLAINTIFF HAD FAILED TO WARN THE DEFENDANT THAT THE OFFICER IN QUESTION HAD ACTED DISHONESTLY.

*This is an action brought by the Colonial Government to recover the amount of a bond and interest thereon, subscribed by the defendants for the due and faithful discharge by Mr Carosin of his duties as District Cashier.*

*The plaintiff also avers that by a letter dated the 20th December 1883 the defendants admitted their liability.*

*The defendants for their 4th plea urged that they were not indebted because the plaintiff*

*trusted Carosin beyond the bounds of ordinary prudence, inasmuch as the plaintiff had continued to trust Carosin after he had been guilty of dishonesty of which the plaintiff had become aware, and so, that having made the discovery the plaintiff was bound to inform the defendants who had thereupon the right to withdraw from their guarantee, and the plaintiff having omitted to do so the defendants are discharged as far as the acts of dishonesty in the act of declaration alleged are concerned; 6o. that the facts disclosed by the verification of Carosin's accounts were such that it was incumbent on the plaintiff at once to dismiss Carosin from the service, and by the omission of Government to do so and to give notice to the defendants of the facts disclosed, the defendants are discharged from all liability.*

*in regard to the letter abovementioned the defendants plead that it was written when they were ignorant of the facts.*

*After hearing evidence the Court held that the admission of liability was made under essential error and could not bind the defendants. Further that the fourth, fifth and sixth pleas are a good answer to plaintiff's action which is dismissed with costs.*

COLONIAL GOVERNMENT, — Plaintiff

versus

LONDON GUARANTEE & ACCIDENT  
COMPANY LIMITED, Defendants

Before

His Honor ANDREW MURK, — Puisne Judge

and

His Honor LOUIS VICTOR DELAFAYE, —  
Acting Puisne Judge

JOHN Mc DOUGALL GIBSON Substitute Procureur and Advocate General, — Counsel for Plaintiff

J. GUIBERT, — Crown Attorney, Attorney for the same

G. GUIBERT, — Counsel for Defendants  
H. BERTIN, — Attorney for the same

Record Number 22,345.

24th December 1884.

This is an action brought by the Colonial Government against the defendants to recover the sum of Rupees 10,000 with interest at 9 per o/o per annum from the day of the service of the declaration, for which they are said to be liable to the plaintiff under their Bond dated 4th December 1882 and letter of 20th December 1883.

From the declaration and documents in process it appears that one Carosin having been appointed a District Cashier in Mauritius, and having been required to enter into a Bond for the due and faithful discharge of his duties, while he should be employed in the said office, and also to find a security who should enter into another Bond for the sum of Rupees 10,000, the defendants at the request of Carosin agreed by the Bond referred to to be security for him in respect of such due and faithful discharge of his duties, while he should be employed in the said Office, for the period of twelve months from the 19th day of September 1882, in consideration of a Premium paid at that date to the defendants and for which payment the defendants' agent in Mauritius granted a receipt, which was then delivered to Carosin, and which contained an obligation to prepare and deliver a policy.

The documents founded on in the declaration is a Bond in the Penal form, and it contains conditions which if fulfilled by Carosin, voided the obligation, but if not it remained in force. These conditions therefore are not only a measure of the duties of Carosin but also show what the defendants had a right to expect from him and the parties affected by the Bond. Carosin styled in the Bond "the employed" during the continuance of his said office was well and sufficiently to perform and execute the duties of his said office and conduct himself with fidelity, integrity and punctuality in and concerning the matters and things entrusted to him as such officer, or in respect of such duties, and was well and truly to apply and pay all sums of monies, &c. as should come to his hands by virtue of such office or duties, and was at all times, when duly required to produce and render true and correct accounts of the receipts

and payments of all such sums of money, &c. as should come into his hands and was not in any wise to take to his own use, misapply, lend or embezzle, make away, neglect to account for, lose or hazard any sum or sums of money, &c., and was to pay to the person duly authorized to receive the same, the balance (if any) remaining in the hands of and due from him the said employed.

It appears also that the Government of Mauritius issues instructions to all District Cashiers, under which the latter are required to deposit daily their collections in a strong box and if a greater sum than £ 500 or Rs. 5000 be collected they are at once to apprise the Auditor General.

The declaration goes on to aver that Carosin did not conduct himself with fidelity and integrity in his office of District Cashier from the 21st January to the 17th March 1883 and that the District Magistrate certified that the amount of loss and damage occasioned to the Government of Mauritius by the acts and defaults of Carosin amounted to R. 12,615.38 c. and that defendants have not paid, nor made good to the plaintiff, the amount of the said Bond. It is also averred that the defendant's agent in Mauritius by letter dated 20th December 1883 admitted the liability of the company, and promised to settle the plaintiff's claim upon being previously furnished with a detailed statement of Carosin's defalcations, and that in breach thereof they have not paid the penal sum, for which they are liable under the Bond.

The defendants besides the usual general pleas further plead (4) that they are not indebted because the plaintiff trusted Carosin beyond the bounds of ordinary prudence inasmuch as the plaintiff continued to trust Carosin after he had been guilty of dishonesty, which the plaintiff became aware of on or about the 5th, 6th, and 7th December 1882 by the verification then made of Carosin's Chests and Books and (5) that having made that discovery the plaintiff was bound to inform the defendants, who had thereupon the right to withdraw from their guarantee, and the plaintiff having omitted so to do, the defendants are discharged as far as the acts of dishonesty in the declaration alleged are concerned and (6) that the facts disclosed by the verifications above mentioned were such that it was incumbent on the plaintiff, at once to dismiss Carosin from their service, and by the omission of Government to do so and to give notice to the defendants of the facts disclos-

ed by the abovementioned verifications, the defendants are discharged from all liability.

In regard to the liability founded on the alleged admission by letter the defendants plead (7) that the letter was written when the facts disclosed had not come to their knowledge and whilst they were in error as to the said facts.

The plaintiffs have replied (1) that by the verifications referred to they were only made aware of certain irregularities on Carosin's part (2) that these having caused no loss to the Colonial Government, the said Government was not bound to give notice of the same to the defendants, or to dismiss Carosin from the Colonial service and (3) at all events the said irregularities in no way to the knowledge of the Government constituted acts of dishonesty.

The defendants have led evidence in support of their pleas above detailed, and produced documents. The plaintiffs did not lead any evidence, but contended themselves with cross examining the defendants' witnesses and with the production of the Bond in question, of certain letters and of the reports of certain officials on the alleged irregularities.

In the Bond there is no clause expressly stating that if the Government of the Colony discovered acts of dishonesty, or breaches of duty on the part of the employed whose honesty was guaranteed, the Government was bound to give notice to the defendants.

The question of law raised by the defendants does not then depend upon agreement or contract, but on the general principles of the law of principal and surety.

Long ago Lord Eldon laid down the doctrine broadly in the Case of Craythorne vs. Swinburne 14 Ves. 164, that the rights of a security depend rather on principles of equity than on the actual contract and this doctrine has been since quoted with approbation and reiterated by judges of eminence in other cases (see *Pearl vs. Deacon* 26 L. J. N.S. Chanc. 761)

If then the equitable relations between the parties is the guiding principle for the decision of the question before the Court and assuming for the present that dishonesty or a breach of duty on the part of the assured has been discovered by the creditor what is the law which regulates the rights of parties and

is there any duty in such an event on the creditor in the bond towards the surety?

The older law as gathered from the earlier decisions seems to have been this—broadly stated—that the object of the Bond was to guarantee the honesty of the person guaranteed, that if at the inception of the contract any concealment of material facts was practised, that would be evidence of fraud which the surety would be entitled to plead in answer to a claim on the Bond. But while the Bond was in operation the mere forbearance of the creditor, or his neglect to call the debtor to account in due time, or his failure to use all the means in his power to guard against the consequences of dishonesty or breach of duty did not discharge the security and as issaid by Lord Kingsdown in delivering the judgment of the Privy Council in *Black v. Ottoman Bank* (15 Moore P.C. 472) there must be some positive act done to the prejudice of the surety or such a degree of negligence as, in the language of vice Chancellor Wood in *Dowson vs. Lawes* (1 Kay 280) to imply connivance and amount to fraud. It is familiar law that any act of indulgence given to the debtor by agreement with him which acted injuriously on the interests of the surety discharged the latter from his obligation.

But the law of suretyship has not rested there and has advanced during later years further than we have indicated. In 1870 occurred the case of *Burgess vs. Eve* L. R. 13 Ex. 450 in which V. C. Malins expressed a legal opinion on the question now raised in the following terms (Page 457) "a person who has entered into such a guarantee and who is therefore responsible for the person whose fidelity is guaranteed has a right to withdraw from that guarantee when the person has been proved guilty of dishonesty" and again (Page 450) "my opinion is and I have no hesitation in expressing it that a person who gives a guarantee would have a right to say to the person taking it "you will continue at your own peril to employ the person on whose behalf I gave the guarantee" provided that the clerk or the person has been guilty of embezzlement or gross misconduct or has turned out to be unworthy of the confidence reposed in him by the person giving the guarantee for him."

These remarks were "*obita dicta*" and were not absolutely necessary to the decision of the case in hand and of themselves would

not be binding as law on succeeding Judges. In 1872 the above case was followed by that of *Phillips vs. Foxall* L. R. 7. Q. B. 666 in which it being an action founded on a guarantee for the honesty of a servant, the defendant urged the same pleas as are here pleaded and part of the plea in that case was thus worded "that the plaintiff discovered and became aware of the breaches of duty and embezzlements by J. Smith on or about 20th November 1869, and the plaintiff without communicating to the defendant or informing him of the breaches of duty, defalcations and embezzlements of J. Smith or any or either of them, agreed with Smith that he should continue in the service and in the performance of the duty of collecting and receiving monies for and on behalf of the plaintiff and thereupon the service of the plaintiff and the performance of the duty of receiving and collecting monies for and on behalf of the plaintiff was continued until a certain date" and the plea went on to state that the defendant was ignorant during the whole continued service of the embezzlements and breaches of duty of the servant prior to the 20th November, and alleged that by reason of the non disclosure to the defendants by the plaintiff of the default and embezzlement, the defendant was prevented from immediately revoking the guarantee. Now it was held on demurrer by the Court of Queen's Bench consisting of Chief Justice Cockburn and Justices Lush, Quain and Blackburn that the plea was a good answer to the declaration and that if a Master discovers that the servant has been guilty of dishonesty in the course of the service and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. The majority of the Court held that the representation and understanding as to the trustworthiness of the servant on which the contract was originally founded continued until its termination.

Justice Blackburn though concurring in the result and holding like his brethren that the Law contained in *Burgess vs. Eve* was well founded, based his opinion on a different principle which we prefer to that of the majority. He held that the surety was discharged, because by continuing the servant in her service, after knowledge of misconduct, the plaintiff had deprived herself of the right

of terminating the service, a right which the surety was entitled in equity to have exercised for his protection. We think it clear that the very object of the contract of suretyship is to protect the person guaranteed against the dishonesty or breach of duty of the person employed, and it seems to us not to follow clearly that the misconduct or breach of duty puts an end at once to the contract and that the employer on hearing of it must give notice to the surety.

Whereas it is clear law that the surety is entitled in equity to exercise all the rights which the creditor in the obligation can exercise against the person employed, and if the former fails to exercise a right of dismissal, which dishonesty or breach of duty entitled him to act upon, and which the surety, if he had known, might have insisted on being done, the latter seems to be discharged from his obligation for the future. But without dwelling on this further, a clear principle is laid down in that case by the Court of Queen's Bench to which the Court is bound to give effect in every case, in which similar facts occur and this all the more that the law thus laid down has been held to be binding in a decision of the Court of Exchequer *Sanderson v. Aston* L.R. Exchq. Vol. 8 p. 73.

It was pleaded by the Substitute Procureur General in the present case that in all the cases actual dishonesty had occurred and that that was necessary to sustain the law laid down in *Burgess vs. Eve* and in *Philipps vs. Foxall*. The allegation in *Sanderson's* case was that the "employé" had failed to pay over certain sums of money which had come into his hands for the plaintiff. The Chief Baron expressly negatives the argument drawn from actual dishonesty and says that "if any default or breaches of duty, whether by dishonesty or not, have been committed by the employed against the employer under such circumstances that the employer might have dismissed the employed the surety is entitled to call upon the employer to dismiss him" and all the judges express the opinion that the defence founded on the third plea which was not limited to dishonesty, but merely alleged a failure to pay which might have been interpreted into a mere delay of payment was good.

It is observable that the Bond founded on was very similar in its terms to that which is produced in the present action and that the

sole breach of duty alleged was that the employed did not well and satisfactorily account for, pay over or deliver to the plaintiff certain sums of money. It is the opinion of the Court of Exchequer that if the plea or the facts show that the employed received money which he did not pay over, it was sufficient to entitle the employer to dismiss him and that the surety was entitled to notice of the dishonesty or breach of duty. Again in *Burgess v. Eve* the language of V. C. Malins is quite general, he extends the principle he laid down not only to dishonesty but to any conduct which made the employed unworthy of the confidence reposed in him.

Coming to apply the law thus fixed upon high authority to the facts of this case, we have to consider chiefly the report of Mr Fitzpatrick who was an examiner of the Auditor General's office. It was explained at the bar that Carosin not having made any payment into the Treasury for some months a surpraisal of his chest was ordered and that was done by Mr Fitzpatrick on the 5th, 6th and 7th December 1882. His report with the annexures thereto contain nearly all the facts, upon which the decision of this case depends. Carosin in the first place endeavoured to delay the audit of his chest and books but that being refused, the cash and vouchers in his chest were verified, in his presence, and he admits by writing and signing the word "approved" on Mr Fitzpatrick's annexures that the sum there stated was correct. The next day the examiner met Carosin at the station of Mahebourg on his way to Port Louis to settle as he said with the Treasury to which the former consented. During this visit to Port Louis, Carosin paid into the Oriental Bank, where the accounts of the Government were kept, various cheques one of which was a cheque of Rs 4,000 drawn by himself on the Commercial Bank. He paid in all a sum of Rs. 8189. 36 Cents and obtained a Treasury receipt for that amount; this receipt he placed in his chest, on his return to Mahebourg. Meanwhile Mr Fitzpatrick proceeded by himself to strike the balance between the Cashier's books and cash and vouchers which showed a deficit of Rs 6792. 72 Cts. Carosin after checking the books and accounts himself next day admitted this deficit to be correct and as before wrote and signed the word "approved" in the Balance sheet, but he explained that he had omitted to show the examiner certain cheques which he had paid into the Bank the day after and which accounted for the deficit. To ascertain this another surprisal

of his chest was made by the examiner who found then only a deficit of Rs 22.46 Cts. but it appears from the examiner's report that he had paid into Bank five cheques out of fifteen which he had in his chest on the fifth amounting to Rs 8990.62 Cts. which being deducted from the sum paid into the Treasury left Rs 4198.74 Cents which says the examiner may represent some of the cheques which he forgot to show on the fifth, but does not represent the deficit then found Rs 6792.72. again comparing the cash and cheques found in the chest on the two surprisals, he receives between the 5th and the 7th..... 445.62 but the cheques had increased by..... Rs. 754.06 and the cash by .... 1041.52=1795.58

Rs. 1349.96

so that he had put both money and cheques, into the chest between these two surprisal visits.

While this was going on at Mahébourg, the cheque for R. 4000 on the strength partly of which he had received the treasury receipt for upwards of R. 8000 was dishonored by the Commercial Bank which had only R. 230 on their books to his credit; of course the Oriental Bank brought this fact at once to the notice of the Receiver General, who addressed strong remonstrances to Carosin on the subj-ct. Carosin came to town on the 9th of December and paid into the Commercial Bank by cheques and otherwise such a sum as enabled the Bank to honor the cheque of Rs 4000; the greater part of the sum paid in by Carosin consisting of cheques by various parties dated between the 7th and 9th of the month. But among the cheques paid into his private accounts there was one of R. 500 by Halais which had been in his chest at one of the surprisals and was put to his credit as Government funds. The Receiver General having demanded explanations from him of the strange facts that he had paid in a cheque for Rs 4000 without funds in Bank to meet it, it is enough to say that his explanations were of the most unsatisfactory character and could deceive nobody into the supposition that they were genuine. The reports upon Carosin's conduct seem to have passed through various offices of the Government, some of whom commented unfavorably upon the state of the facts until they reached the hands of the Lieutenant Governor for the time being, who approved of a suggestion that Carosin should be changed from the District of Grand Port to that of Flacq. This suggestion was

carried out, and on the 21st January 1883 the District Cashiership of Flacq was entrusted to him, where, upon the 17th March another surprisal was made on his chest and the deficit of upwards of Rs 12,000 was found to exist in reference to which the present action is brought.

Such are the facts with which the Court has to deal and from these facts we think it clearly follows that Carosin had committed in the first place a violation of departmental regulations in failing to report a balance of over Rs 5000 to the Treasury. In the second place the deficit in his cash account of Rs 6792.72 shows a breach of duty of a serious character in not producing and rendering true and correct accounts as required both by his duties as a Cashier and as conditioned by the Bond upon which the present action is brought. In the third place the deficit which appeared at the first surprisal, and the increase of cash and cheques which were found at the second surprisal, clearly shows that he had been dealing with the Cash in his chest as if it had been his own money, and that he had put money and cheques into the chest for the mere purpose of balancing it. This was not the conduct which ought to have been followed by one who was a custodian of money merely, and who was bound to deposit daily in his chest all his receipts in conformity with the instructions, still worse appears to have been his conduct with reference to the cheque of Rs 4000, he must have known that that cheque would be dishonored, and that he was playing off a fraud upon the Government in obtaining from them a receipt by means of which his chest would be temporarily balanced. It is true that he succeeded some days after the date of that cheque in obtaining money which enabled it to be paid, but that does not take away from the grave character of the facts, and when to that is added that he employed one of the Government cheques to make up the sum of Rs 4000 by paying it into his private account, it is clear he had been reduced to great straits, and that he continued to deal with the contents of the chest as if they were his own money. The Court cannot but think that the conduct of this man was most reprehensible, which would if he had been an ordinary servant, have justified his immediate dismissal, and that a close enquiry should have been then and there made into it, and that sufficient revelations were made to cause that inquiry to take place. If that had been done, there can be no doubt Carosin would have been interdicted by the Governor from performing the



duties of his Office, and that notice of this would have reached the defendants, who would have been able to withdraw from their suretyship, and that at all events such interdiction would have rendered impossible any further defalcations.

It was argued by the plaintiff's Counsel that the Court was bound to place itself in the position of the superiors of Carosin, who had no suspicion that he was a dishonest man, and believed him to have violated some departmental Rules merely. But the Court think that they are bound to interpret the facts as they appear on the face of the reports and accounts, and that mere belief and supposition of honesty is no answer to these facts, when in the opinion of the Court, they point the other way.

Again it was argued that the Government had no knowledge of the defendant's company, or of the contract into which it had entered, the Bond having been executed in London on the 4th December and having only reached Mauritius in the beginning of January 1883. But by the 310th article of the Colonial Regulations all officers entrusted with public money are bound to give security, and it was not denied that the defendant's office was one of those mentioned in the circular from the Colonial office of 6th February 1872, which names certain Guarantee offices whose bonds may be accepted. As Carosin has been called upon and it was his duty to find such security, and as in point of fact their obligation had commenced from the preceeding 19th September, when the premium was paid and a provisional receipt given to Carosin, it seems to be the plaintiff's own fault if they were not aware of the defendant's position, and that they are not entitled to avail themselves of their ignorance, if it existed, as an answer to the defendant's plea. In such a case as the present it is not necessary to suppose that the Government would have had to take any active steps to inform the defendants. The publicity which would have been given to the suspension and interdiction of Carosin, and the subsequent procedure of appearing before the Executive Council would have attracted the attention of all persons of this Island and amongst others the defendants' agent. It was argued also that he was accustomed to refer all matters to London for the determination of the Board of Directors there and that he certainly would have consulted them on this phase of the case.

It is inconceivable that he would have taken this step and so waited three months when an intimation from him that his clients were in future free from all liabilities under their Bond was the sole matter necessary to be done.

The plaintiffs also found their case upon an alleged admission of liability contained in a letter from the defendants' agent to the Crown Attorney dated 20th December 1883; the defendants' pleading in answer to this that it was written when they were ignorant of the facts contained in M. Fitzpatrick's report, and therefore that they were in essential error in regard to the facts of the case. The defendants' agent and his clerk who attends to the business of the Company have both sworn that Fitzpatrick's report was accidentally discovered in the Criminal Record of the case against Carosin when they were looking for the subsequent report upon the state of his chest at Flacq. There is not the least reason to doubt the correctness of this statement, and that being so it is clear that the admission given was made under essential error and cannot bind the defendants. We must therefore hold that the fourth, fifth and sixth pleas of defendants are a good answer to the plaintiff's action, which we accordingly dismiss with costs.

### SUPREME COURT.

PARTY WALL RAISED WITHOUT NOTICE BEING GIVEN TO NEIGHBOURING PROPRIETOR—DAMAGES AWARDED, BUT THE COURT REFUSED TO ORDER REMOVAL OF SUPERSTRUCTURE.

*The plaintiff, in this matter, lays claim to the sole proprietorship of a wall which divides the respective properties of plaintiff and defendant.*

*A few months ago before this action, the defendant, without giving notice to the plaintiff, raised the wall by about four feet on a length of 125 feet. The plaintiff claims damages for this act, and an order to remove the superstructure.*

*The Court heard evidence and visited the spot. It considered that the wall was a party wall and it ascertained that the defendant had raised the wall without giving notice to the plaintiff as required by article 657 of the Civil Code.*

*The Court held that it was incumbent upon the defendant to give notice to plaintiff before beginning to build in order that the plaintiff might be in a position to object to any interference with his proper interest in the wall, or to retain his share in the whole, by tendering half the cost of the superstructure, and that his failure to do so entitled the plaintiff to compensation.*

*The Court awarded pecuniary damages in the sum of Rs 1,200, but declined to order the removal of the superstructure.*

*The plaintiff is allowed two thirds of his costs.*

DE CHAUMON,—Plaintiff

versus

JACKARIAH,—Defendant

Before

His Honor E. J. LECLEZIO,—Chief Judge

and

His Honor F. C. WILLIAMS,—Puisne Judge

L. ROUILLARD,—Counsel for Plaintiff  
F. VICTOR,—Attorney for the same

Hon. W. NEWTON,—Counsel for defendant  
E. LEBLANC,—Attorney for the same

Record No.22,556

24th December 1884.

The question in this case is as to the respective rights of Plaintiff and defendant in a wall dividing their properties. Some three or five months ago this wall was raised about four feet for one hundred and twenty five feet of its length by defendant without any reference to Plaintiff.

The plaintiff now asserts that the wall was his sole property and he asks the Court for an order to remove the superstructure and for

damages for its erection. The defendant by his pleadings asserted that the wall, if not his own, is, at all events a party wall, and upon this the plaintiff joined issue, so that in our view the whole question of the nature and character of the wall and of the respective rights of plaintiff and defendant in it, is raised in the present action upon the question of fact as to the character of the wall,—whether it is a private wall or a “mur mitoyen,” we have heard evidence and have visited the spot, and we may say at once that we have not seen or heard any thing to justify us in regarding the wall in its original state as the exclusive property of either plaintiff or defendant. There are certainly some signs on the plaintiff's side which lend colour to his claim of ownership, but they do not form a sufficient basis to establish it, and his own evidence as to the original character of the top of the wall is directly contradicted by the town architect and by others who saw it before it was raised, nor is it borne out by what we have seen of the unraised portion of the wall remaining. On the other hand, at one extremity of the wall there are unmistakable marks of pent-houses having been built against it, and into it, on both sides. While at the other extremity, the end of a separate building on the defendant's side rests partly on the wall in dispute. These visible indications lend much support to the view that the wall in question is a party wall or a “mur mitoyen.” The contention that it is the exclusive property of the defendant was not supported by evidence and was, in fact, abandoned in the argument.

Regarding this wall then, which defendant has raised, as a party wall, the question remaining is whether he has inflicted any wrong upon the plaintiff by raising it, and what is the measure of that wrong. It is certain that he raised it as alleged, without notice to, or permission from the plaintiff, and it seems clear to us that, in raising it, he did not conform to the restrictions of art. 657 and following, of the Civil Code. The superstructure covers more than half the thickness of the wall, and it seems likely that its drainage will fall on plaintiff's side in contravention of article 681 of the Code unless steps are taken to prevent this, which steps will, in all probability, involve an additional encroachment upon plaintiff's half of the party wall's thickness.

It is, however, contended for the defendant that, the party wall having been raised by him, whether by fair means or foul, the

structure has become virtually the defendant's property, so that he may deal with it as he likes, and apply to it or raise upon it whatever he wishes. We should be sorry, in the public interest, did we feel compelled to give our assent to this sweeping proposition.

There is no doubt that it has received support from certain commentators, who, in limiting the scope of the application of article 662 of the Code, have exhibited what the Counsel for the defence in this case felt compelled to characterize as an "anomaly" in the law.

We prefer to accept an interpretation which does not involve this anomaly and we think that the authority of Demolombe enables us to do so. Demolombe is clearly of opinion that art. 658 (which enables a co-proprietor to raise a party wall at his own expense) and art. 662 (which prohibits him from applying any thing to the body of a party wall without the consent of the co-partner, or without a reference to experts in case of the co partner's refusal must be read together. He says (Book 2 Title 2 chap. 2 art. 416) "quelque soit l'entreprise que l'un des co-propriétaires veuille faire dans le mur mitoyen... il doit obtenir le consentement du voisin, ou, à son refus, faire régler par expert, les moyens nécessaires pour ne pas lui nuire. Telle est la disposition de l'article 662 qui renferme, suivant nous une règle générale applicable même à l'espèce de travaux détachés et prévus par les articles 657, 658 et 659."

It is upon this view of the defendant's obligations that we base our judgment. We hold that it was incumbent upon the defendant to give due notice to the plaintiff before commencing to build, in order that the plaintiff might be in a position to object to any interference with his proper interest in the wall, or to retain his share in the whole of it, the superstructure included, by tendering half the costs of the superstructure in accordance with the provisions of art. 660. His neglect to give this notice has, we find, involved the defendant in a course of action, to use the words of art. 662 "nuisible aux droits de l'autre" or injurious to the rights of the plaintiff. For this interference with his rights, the plaintiff is entitled to compensation; but we do not feel inclined to take the extreme step of ordering the removal of the superstructure, the claim to which removal would only have been reasonable had plaintiff established his exclusive property in the original wall, which he has failed to do.

The result of what we regard as the defendant's illegal act in raising the party wall without any notice to his neighbour, has been to deprive the plaintiff of the possibility of building upon his half of the top surface of the party wall as it stood, and there is some evidence, though it is not very conclusive, that he was about to do this before defendant commenced his proceedings and that he has lost a tenant through his inability to build.

We consider, upon the whole, that the amount of pecuniary damages to which the plaintiff is entitled may be fixed at the sum of Rs. 1200 and there will consequently be a verdict for the plaintiff for that sum as damages—with two thirds of his costs.

### SUPREME COURT.

*This is an appeal from an order given by a Judge in Chambers in the matter of a writ of habere facias possessionem.*

*The Court held that it was competent to apply to a Judge in Chambers on a question of expulsion from property, and that it is the duty of the Judge to order the applicant only to enter a principal action when the defendant has a serious defence to make to the application.*

*Appeal dismissed with costs.*

PAMBOOSEEA—Appellant,

versus

JOOMUN—Respondent.

Before

His Honor A. MURRAY, —Puisne Judge

and

His Honor L. V. DELAFAYE, —Acting Puisne Judge.

B. COLLIN, —Counsel for Appellant  
W. LEBLANC, —Attorney for the same.

Hon. W. NEWTON,—Counsel for Respondent  
H. BERTIN,—Attorney for the same.

Record No. 22,733

24th December 1884.

HIS HONOR MR. JUSTICE MURE :

This is an appeal from an order given by a judge in Chambers in the matter of a writ of *habere facias possessionem*. It appears that the plaintiff had acquired certain property at a place called "Trois Ilots" at Flacq from a person called Joomun alias Sheik Joomun and she comes into Chambers with a summary writ of *habere facias possessionem*. The judge in Chambers had before him an affidavit by the applicant and also one by the respondent. The affidavit of the applicant detailed her title and proceeded to state that though that title had been granted by Joomun himself, that she had been unable to have the delivery and possession of the said properties and "the said Joomun alias Sheik Joomun is in possession thereof and refused to give up the same to me although I have often requested him to do so."

Joomun in his affidavit admits that he granted the title in this land—he admits that the price was paid but denies that he was in possession of it, and asserts that she herself was in possession of the property and had let it to tenants.

The Judge in Chambers allowed the writ to issue, that is to say he interpreted the affidavits presented to him and holding as I presume that the probabilities were in favor of the truth of the plaintiff's affidavit he held her entitled to a writ of *habere facias possessionem* and an appeal has been brought from that decision.

The principal ground of appeal was that the writ of *habere facias possessionem* was incompetent in Chambers, in the circumstances in which this one was issued a subsidiary ground was pleaded, that the Judge in Chambers had wrongly interpreted the evidence and that he ought not to have allowed the writ to issue in the face of the

allegations of the defendant. Now as to the main question before the Court, that a principal action was necessary and that a summary writ was not a procedure which the Court could recognise we have no hesitation in repelling that contention. It is perfectly clear upon the authority of the case of *Edouard vs. Fischau*, in page 74 of *Piston's report of 1880* that it is quite competent to apply to a Judge in Chambers on a question of expulsion from property and that the duty of the Judge is to order the applicant only to enter a principal action when the defendant shews that he has a serious defence to make to the application. From the decision in that case it appears it is matter of practice in the Courts in France under the law of "Référés" that when a person is occupying a piece of land to which he has no right or title, and when a clear title is shown by the party who makes the application, to grant a remedy upon a summary application.

The writ of *habere facias possessionem* is an English writ which is generally granted after a judgment has been given by the Court, but that does not at all settle the question whether a writ of this kind is or not competent before the Judge in Chambers in this Court. It would be very unfortunate indeed that the long procedure of a principal action should be necessary where the party has a clear title to the property, and where the party against whom he brings his action says I gave that title but I deny the right of the applicant to obtain a summary writ against me. We cannot but negative that contention.

It was further said in this case that the Judge in Chambers had granted the writ without having sufficient evidence. It is certainly a very narrow ground that the Judge in Chambers has taken up, we think that it might have been expedient to have additional evidence in some way or other, but what we have to consider is whether the Judge in Chambers had or had not the right to grant the writ. All we have on the side of the defendant is an assertion that he is not in possession, and that the applicant is in possession and is letting the subject, whereas the applicant comes into Court with a serious allegation saying she has acquired the title and is not in possession, and that the defendant refuses to put her in possession. The Judge in Chambers had to consider which of these two assertions was the more likely to be correct, and he came to the conclusion, and naturally

I think, that the applicant's affidavit was the true one. The Judge having determined the case upon that footing we think we cannot interfere with his determination, we think he had sufficient grounds to come to the conclusion to which he has come, and as this is a Court of appeal which is applied to upset that judgment, we do not see sufficient reason for our doing so. In the first place the defence which is made is not a serious one, and the dispute is only one on a question of fact, and as the question of fact was determined in favor of the appellant by the Judge in Chambers we do not think it is right to interfere with the decision.

We therefore dismiss this appeal, with Costs.

### SUPREME COURT

**APPEAL FROM DECISION OF MASTER.—DISPUTED ITEMS IN CLAIM MADE BY A CREDITOR OF A BANKRUPT.—DECISION MAINTAINED.**

*This is an appeal from the decision of the Master who, upon an application of the appellant, a bankrupt, refused to disallow three items in the respondent's claim against the bankrupt's estate, which items the respondent had proved and of which he had received 20 o/o.*

*The appellant's plea was that one item was for goods that had not been delivered, and the other two were the result of errors in accounts.*

*The Court held the gross amount of the respondent's claim had been admitted by appellant and by his agent, and that there was insufficient evidence to lead the Court to reverse the Master's decision.*

**CHUTTOO,—Plaintiff**

*versus*

**MAMOOJEE,—Defendant**

Before

His Honor EUGÈNE LECLÉZIO, — *Chief Judge*

and

His Honor FRÉDÉRIC CONDÉ WILLIAMS,  
Puisne Judge

Hon. W. NEWTON.—Counsel for Plaintiff  
T. NICOLAS,—Attorney for the same

G. GUIBERT,—Counsel for Defendant  
E. GANACHAUD,—Attorney for the same

Record Number 22,639

24th December 1884.

This is an appeal from the decision of the acting Master.

The appellant Chuttoo is a Bankrupt, against whose Estate the respondent proved and received a 20 o/o dividend upon a claim, three items of which the bankrupt now disputes. The Master, after hearing evidence, has refused to disallow these items, and we are now asked to reverse his decision.

The ground upon which the disallowance of these items is asked is that one of them represents the value of goods which were not delivered, though the appellant's brother and subsequent guarantee, signed an account for them, and that two of them are incorrect in fact one representing the appellant as indebted to the Respondent in one thousand rupees more than the actual amount of the debt, and the other giving the appellant credit upon a counter payment for nearly five hundred rupees less than he actually paid.

As regards all three of these items, the general answer is that they cover dealings extending over a space of nearly six years, that the gross amount of respondent's claim finds its place in the appellant's own schedule in his bankruptcy, and was never disputed by the appellant or his agent up to the period of the application to the Master in 1883, and that, as far as two of the items are concerned, they are to be explained by sundry private dealings in the way of loans between appellant and respondent, which are not fully set forth in the book keeping of either party.

What we feel in this case is that we are without sufficient evidence upon which to reverse the Master's decision. The assertion as to the goods not delivered is met with a distinct denial, it is not denied that there were many private dealings between these parties, who were once on terms of great intimacy, which are not recorded, and the bold fact stares us in the face that the gross amount of the respondent's claim has been

admitted by the appellant and by his agent, who actually assumed the responsibility for it; and that it has remained unchallenged for years.

Under these circumstances we are unable to see any clearly defined grounds which would justify us in interfering with the Master's decision. The appeal is dismissed with costs.

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End of the year 1884.









